

Recent Developments in Sentencing: A Sentencing Potpourri from Pretrial Agreement Terms Affecting Sentencing to Sentence Rehearings

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Introduction

*"Gentlemen, Chicolini here may talk like an idiot, and look like an idiot, but don't let that fool you. He really is an idiot. I implore you, send him back to his father and brothers who are waiting for him with open arms in the penitentiary. I suggest that we give him ten years in Levenworth or eleven years in Twelveworth."*¹

How does the government get "*Chicolini* . . . ten years in Levenworth or eleven years in Twelveworth?"² Conversely, what can or should the defense do to ensure that *Chicolini's* new mailing address does not end in "*worth*"? This article, a potpourri of sentencing cases, highlights those cases, including

cases applying waiver, that military justice practitioners should be aware of to successfully represent either the United States government or those service members on the front lines defending the United States. Divided into eleven sub-parts, this article addresses the following areas: pretrial agreement terms affecting sentencing; personnel records; summary courts-martial convictions; aggravation evidence; rehabilitative potential evidence; the unsworn statement; the case in rebuttal; instructions; argument; sentence credit; and sentence rehearings.

Pretrial Agreement Terms Affecting Sentencing—Rule for Courts-Martial (RCM) 705³

Rule for Courts-Martial 705(c)⁴ governs the terms and conditions of a pretrial agreement.⁵ For sentencing purposes, coun-

1. DUCK SOUP (Paramount Pictures 1933) (explaining an appeal to the court when Chicolini (Chico Marx) goes on trial for treason).
2. *Id.*
3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c) (2002) [hereinafter MCM].
4. *Id.*
5. Rule for Court-Martial (RCM) 705(c) states:

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

(2) *Permissible terms or conditions.* Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to confirm the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

Id. R.C.M. 705(c).

sel need to focus on RCM 705(c)(1)(B) which prohibits a term of a pretrial agreement which deprives an accused of “the right to complete sentencing proceedings.”⁶ *United States v. Libecap*,⁷ *United States v. Edwards*,⁸ and most recently, *United States v. Sunzeri*⁹ are three cases addressing RCM 705(c)(1)(B).

In *United States v. Libecap*¹⁰ the appellant entered into a pretrial agreement in which he agreed to request a bad conduct discharge.¹¹ On appeal, the appellant argued he was entitled to a sentence rehearing because the term requiring him to request a punitive discharge was both prohibited by RCM 705 and con-

trary to public policy.¹² The Coast Guard court agreed, finding the term violated RCM 705(c)(1)(B) because “as a practical matter, it deprived the accused of a complete sentencing proceeding.”¹³ The court found, in effect, that any effort by the accused to avoid a punitive discharge through the presentation of evidence on sentencing would be negated by his specific request for such a discharge.¹⁴ Applying the same reasoning, the court also found the term was contrary to public policy.¹⁵

In *United States v. Edwards*,¹⁶ the Court of Appeals for the Armed Forces (CAAF) confronted the same issue that was

6. See *id.* R.C.M. 705(c)(1)(B).

7. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

8. 58 M.J. 49 (2003).

9. 59 M.J. 748 (N-M. Ct. Crim. App. 2004).

10. 57 M.J. 611 (C.G. Ct. Crim. App. 2002). The appellant was tried at a special court-martial and convicted, pursuant to his plea, of three specifications of assault upon his wife and one specification of assault upon a sentinel. The military judge sentenced him to reduction to E-1, forfeiture of \$1,134 pay per month for six months, confinement for six months, and a bad conduct discharge. *Id.* at 612.

11. *Id.* at 613. The term in question reads as follows:

I agree that I will request that the Military Judge award me a Bad Conduct Discharge. My defense counsel has fully advised me that a punitive discharge from the service will carry with it an ineradicable stigma that is commonly recognized by our society. I realize that a punitive discharge will place limitations on employment opportunities and will deny me other advantages that are enjoyed by one whose discharge characterization indicates that he/she has served honorably. A punitive discharge will affect my future with regard to my legal rights, economic opportunities, and social acceptability.

Id.

12. *Id.*

13. *Id.* at 615-16.

While a provision requiring the accused to request a bad conduct discharge at trial leaves him free to otherwise make the best case he can for a minimal sentence, including evidence and argument to the effect that a punitive discharge is unwarranted, we are persuaded that the accused's request for a bad conduct discharge will always have the potential to seriously undercut any other efforts at trial to avoid a punitive discharge. Thus, we are convinced that although such a sentencing proceeding might in some sense be viewed as complete, the requirement to request a bad conduct discharge would, in too many instances, largely negate the value of putting on a defense case, and create the impression, if not the reality, of a proceeding that was little more than an empty ritual, at least with respect to the question of whether a punitive discharge should be imposed.

Id. See MCM, *supra* note 3, R.C.M. 705(c)(1)(B). The right to “complete sentencing proceedings” is a specific right guaranteed in RCM 705(c)(1)(B), however, “complete” is undefined.

14. See *supra* note 16.

15. *Libecap*, 57 M.J. at 616.

For the same reasons [that the court found a violation of R.C.M. 705,] we conclude that, under the circumstances of this case, the provision requiring the Appellant to request a bad conduct discharge was against public policy . . . [W]e are convinced that enforcement of the provision would interfere with the sentencing process and undermine public confidence in the integrity and fairness of the Appellant's court-martial.

Id. Since the prohibited term dealt with sentencing only, the court affirmed the findings, set aside the sentence, and authorized a rehearing on sentence. *Id.* at 617. Although the term of the pretrial agreement required the appellant to request a punitive discharge, he failed to comply with that term at trial, a failure deemed by the court to be breach of a material term of the pretrial agreement. *Id.* Despite this breach, neither the military judge nor the government inquired into it, resulting in what the court termed an incomplete pretrial agreement inquiry. *Id.* On remand, the convening authority ordered a rehearing at which the military judge sentenced the appellant to reduction to E-1, 125 days confinement, and a bad conduct discharge. *United States v. Libecap (Libecap II)*, 59 M.J. 561, 562 (C.G. Ct. Crim. App. 2003). On appeal for a second time, the sentence was approved. *Id.*

16. 58 M.J. 49 (2003). The appellant was convicted at a special court-martial, pursuant to his pleas, of wrongful use of lysergic acid diethylamide (LSD) and marijuana and sentenced to four months confinement and a bad conduct discharge. *Id.* at 50.

before the *Libecap*¹⁷ court: whether RCM 705 or public policy prohibited a term of a pretrial agreement. After charges were preferred, the appellant's area defense counsel (ADC) contacted the Air Force Office of Special Investigations (AFOSI) to advise them of his representation of the appellant and to further inform them that all requests to question the appellant should go through him. Despite acknowledging the representation, the AFOSI nonetheless contacted the appellant directly, interrogating him without notifying the ADC.¹⁸ As part of the pretrial agreement, the appellant agreed not to mention the AFOSI interview or any rights violations associated therewith.¹⁹

On appeal, the appellant argued that the AFOSI-interrogation term of his pretrial agreement violated public policy.²⁰ The service court disagreed.²¹ In affirming the lower court's decision, the CAAF found the term was neither contrary to public policy nor prohibited by RCM 705.²² The court focused on whether the term deprived the appellant of a "complete sentencing proceeding"—specifically, whether the term limited the accused's right to present matters in extenuation, mitigation, or rebuttal. Noting the right to make an unsworn statement is "not unlimited," the court looked to the text of RCM 1001(c)(2)(A) which allows an accused, in his unsworn statement, to present

matters in extenuation, mitigation, or rebuttal.²³ After examining the rule and the pretrial agreement term at issue, the court found that the alleged unconstitutional interrogation, even if unjustified or inexcusable, did not "serve to 'explain the circumstances' of the offense [extenuation], tend to 'lessen the punishment to be adjudged [mitigation],' or rebut anything presented by the prosecution [rebuttal]."²⁴ The term, thus, did not deprive the appellant of a complete sentencing proceeding.

The last case in this area is *United States v. Sunzeri*.²⁵ In *Sunzeri*,²⁶ the appellant, as part of his pretrial agreement, offered the following term (paragraph 18f of the agreement):

That, as consideration for this agreement, the government and I agree not to call any off island witnesses for presentencing, either live or telephonically. Furthermore, substitutes for off island witness testimony, including but not limited to, Article 32 testimony, affidavits, or letters will not be permitted or considered when formulating an appropriate sentence in this case.²⁷

17. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

18. *Edwards*, 58 M.J. at 50.

19. *Id.* Initially, the government and defense discussed a "four-month cap" without the disputed pretrial agreement term. It was only after the defense counsel submitted notice that his client intended to mention the unlawful interrogation in his unsworn statement that the government indicated it "would not support the pretrial agreement if Appellant intended to discuss any alleged violation of his constitutional rights." *Id.* The relevant portion of the pretrial agreement stated as follows:

Agree to waive any motion regarding my constitutional rights to counsel and my right to remain silent during AFOSI interviews and other questioning conducted by the AFOSI that occurred after I was represented by counsel. In addition, I agree not to discuss any of the circumstances surrounding my interrogation or questioning during my care [sic] inquiry, any sworn statement, any unsworn statement during my trial. Although it was my intention to discuss these matters at my trial, I specifically waive my rights to discuss these matters to gain the benefit of this pretrial agreement.

Id. at 51.

20. *Id.*

21. *Id.*

22. *Id.* at 53.

23. *Id.*; see also MCM, *supra* note 3, R.C.M.1001(c)(2)(A). Rule for Court-Martial 1001(c) states, in part:

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

MCM, *supra* note 3, R.C.M.1001(c)(2)(A).

24. *Edwards*, 58 M.J. at 53.

25. 59 M.J. 758 (N-M. Ct. Crim. App. 2004). The appellant was convicted at a general court-martial, pursuant to his pleas, of various drug related offenses and sentenced to reduction to E-1, confinement for ten months, and a bad conduct discharge. *Id.* at 759.

26. *Id.* at 758.

In examining the pretrial agreement, the military judge “considered rejecting paragraph 18f” as contrary to public policy, however, declined to strike the provision after considering the following: the term (paragraph 18f) originated with the defense; the term was aimed at preventing the government from introducing certain evidence against the appellant on sentencing; were it not for the term (paragraph 18f), the appellant would have called two witnesses, his father and his best friend; the two witnesses the appellant would have called were the subject of an earlier defense motion to compel production, a motion the military judge granted; the appellant stated on the record that he believed the term was in his best interest; and the term applied equally to both the government and the defense.²⁸

On appeal, the appellant argued paragraph 18f violated public policy and deprived him of a complete sentencing proceeding. The service court, relying on the plain meaning of RCM 705(c)(1)(B), agreed, finding paragraph 18f to be both contrary to public policy and a violation of RCM 705(c)(1)(B). In setting aside the sentence and remanding the case, the court relied heavily on the appellant’s assertions at trial that, but for the agreement, he would have presented more evidence on sentencing, specifically the two witnesses who were the subject of the defense’s successfully litigated pretrial motion to compel.²⁹

Libecap,³⁰ *Edwards*,³¹ and *Sunzeri*³² send a clear message to trial practitioners. Innovative and unique pretrial agreement terms affecting sentencing will be carefully examined to determine if they violate public policy³³ or the plain meaning of RCM 705(c)(1)(B). If they adversely affect an accused’s right to present a “complete sentencing proceeding,” they will be struck down. Trial counsel, relying on *Edwards*,³⁴ should argue that a provision in question does not affect an accused’s right to present evidence in extenuation, mitigation, or rebuttal.³⁵ Defense counsel should argue the converse, articulating for the military judge why the provision in question violates public policy by preventing the client from presenting a “complete sentencing proceeding”; that is, the client’s right to present evidence in extenuation, mitigation, or rebuttal has been restricted, limited, or, practically speaking, taken from him.

The next part of this article addresses the government’s sentencing case, commonly referred to as the case in aggravation.³⁶ The cases discussed will address the admissibility of Article 15s as personnel records, summary courts-martial convictions as prior convictions, aggravation evidence, and evidence regarding rehabilitative potential.

27. *Id.* at 759. The agreement also had a provision limiting the funding of travel expenses for off island sentencing witnesses, to wit, paragraph 18c, which stated: “That, as consideration for this agreement, I will not require the Government to provide for the personal appearance of witnesses who reside off the island of Oahu to testify during the sentencing phase of the courts-martial.” *Id.* at 760.

28. *Id.*

29. *Id.* at 762. In remanding the case, the court noted that although paragraph 18f was unenforceable, the same was not true for paragraph 18c, which could be enforced. Paragraph 18c only precluded government funded off island live testimony, whereas paragraph 18f, the provision in question, prevented the appellant from introducing any evidence, in any format, from the only two sentencing witnesses he deemed relevant. *Id.* at 763.

30. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

31. 58 M.J. 49 (2003).

32. *Suzeri*, 59 M.J. at 758.

33. Provisions which turn the proceeding into an “empty ritual” violate public policy.

What provisions violate appellate case law is determined by reference to precedent. Determining what provisions violate “public policy” is potentially more troublesome. Appellate case law, its sources, and R.C.M. 705 are, themselves, statements of public policy. The United States Court of Military Appeals has observed that a pretrial agreement provision that “substitutes the agreement for the trial, and, indeed, renders the latter an empty ritual” would violate public policy. *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174, 178, 1968 WL 5361 (1968). Beyond that, however, the Court of Military Appeals “has not articulated any general approach to pretrial agreement conditions that can be used to determine which conditions are permissible and which are to be condemned. An analysis of the cases suggests, however, that the court will disapprove those conditions that it believes are misleading or [abridge] fundamental rights of the accused . . .” Francis A. Gilligan & Frederick I. Lederer, *Court-Martial Procedure* § 12-25.20 (1991).

Id. at 760-61.

34. *Edwards*, 58 M.J. at 49.

35. See MCM, *supra* note 3, R.C.M. 1001(c).

36. Referring to the government’s case as the case in aggravation is actually a misnomer because the applicable RCM 1001(b), is broken down into five discreet components: “Service data from the charge sheet”; “Personal data and character of prior service”; “Evidence of prior convictions of the accused”; “Evidence in aggravation”; and “Evidence of rehabilitative potential.” See *id.* R.C.M. 1001(b)(1)-(5).

Personnel Records—Rule for Courts-Martial 1001(b)(2)³⁷

Personnel records under RCM 1001(b)(2) are admissible on sentencing provided they are “maintained in accordance with departmental regulations” and “they reflect the past military efficiency, conduct, performance, and history of the accused.”³⁸ Items normally offered by the government under RCM 1001(b)(2) include, among other items, letters of reprimand³⁹ and Article 15s.⁴⁰ The key to admitting documents from a service member’s personnel records is that the evidence offered is maintained in accordance with the applicable departmental regulations. The case worth noting in this area is *United States v. LePage*.⁴¹

In *LePage*,⁴² the government offered, without objection from the defense,⁴³ prosecution exhibit (PE) 3, a record of non-judicial punishment dated 14 April 1999.⁴⁴ On appeal, the appellant alleged that the military judge committed plain error⁴⁵ by

admitting PE 3 in direct violation of § 0141 of the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C (JAGMAN).⁴⁶ This section prohibits the admission of non-judicial punishment actions for offenses committed over two years before any of the offenses for which an accused stands convicted.⁴⁷ The nonjudicial punishment action related to an offense committed in March 1999. The offense for which the accused was convicted was committed in January 2002, nearly three years after the offense captured by PE 3. In short, the personnel record was inadmissible under the relevant service regulation. Upon realizing his error, the military judge held a post-trial Article 39(a)⁴⁸ session where he made findings of fact, to include a finding that the appellant was prejudiced by his erroneous admission and consideration of the nonjudicial punishment action, and recommended that the convening authority disapprove the discharge.⁴⁹ Notwithstanding the military judge’s post-trial actions, the convening authority approved the discharge.⁵⁰

37. *Id.* R.C.M. 1001(b)(2).

38. *Id.* Rule for Courts-Martial 1001(b) states, in part:

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused’s marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.

“Personnel records of the accused” includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

Id. R.C.M. 1001(b)(2).

39. *See, e.g., United States v. Clemente*, 50 M.J. 36 (1999); *United States v. Williams*, 47 M.J. 142 (1997). *But see United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993).

40. *See, e.g., United States v. Craze*, 56 M.J. 777 (A.F. Ct. Crim. App. 2002); *United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996); *United States v. Mack*, 5 M.J. 238 (C.M.A. 1978).

41. 59 M.J. 659 (N-M. Ct. Crim. App. 2003).

42. *Id.* The appellant was tried by a military judge alone sitting as a special court-martial for one specification of wrongful use of marijuana on 2 January 2002 and sentenced to reduction to E-1, forfeiture of \$737 pay for one month, fifteen days confinement and a bad conduct discharge. *Id.*

43. *Id.*

44. *Id.*

45. Plain error is (1) error (2) that is plain and obvious and (3) materially prejudices a substantial right of an accused (or appellant). *See, e.g., United States v. Scalo*, 59 M.J. 646, 649 (Army Ct. Crim. App. 2003); *United States v. Kho*, 54 M.J. 63, 65 (2000); *United States v. Wilson*, 54 M.J. 57, 59 (2000); *United States v. Finster*, 51 M.J. 185, 187 (1999); *United States v. Powell*, 49 M.J. 460, 463 (1998).

46. MANUAL OF THE JUDGE ADVOCATE GENERAL, JUDGE ADVOCATE GENERAL INSTR. 5800.7C (C3, 27 July 1998) [hereinafter JAGMAN]. *LePage*, 59 M.J. at 659-60. The appellant also made two other allegations: that the military judge erred by failing to take corrective action in a post-trial Article 39(a) session and that his trial defense counsel was ineffective for failing to object to the admission of PE 3. *Id.* Since the court found that the admission of PE 3 was both plain error and prejudicial, the court granted relief on this basis and failed to reach the remaining two allegations of error. *Id.*

47. *Id.* at 660.

48. UCMJ art. 39(a) (2002).

49. *LePage*, 59 M.J. at 660. The military judge also erroneously determined that he lacked authority to cure the defect post-trial when in fact he could have held a post-trial proceeding in revision under RCM 1102(b)(2) to cure the defect. *Id.*

In evaluating whether the erroneous admission of the nonjudicial punishment action was waived by the defense counsel's failure to object, the court noted:

Plain error leaps from the pages of this record. The military judge's remarks leave no doubt that Prosecution Exhibit 3 had a significant and prejudicial effect on his sentencing deliberations and on the sentence ultimately imposed on the appellant. The military judge's remarks also make clear that he would not have imposed a bad-conduct discharge absent his consideration of Prosecution Exhibit 3.⁵¹

Finding plain error, the court held that the waiver did not apply and set aside the punitive discharge.⁵²

Trial and defense counsel dealing with personnel records, whether attempting to introduce them or opposing the introduction, must be familiar with the applicable service regulations. Admission of evidence specifically prohibited by regulation will certainly result in a finding of error and possibly, plain error (i.e., error resulting in prejudice). Defense counsel—the

good news for your client is that your failure to object to the admission of evidence specifically precluded by regulation does not waive the issue on appeal. The bad news, however, is that such a failure screams of ineffective assistance of counsel. Trial counsel—justice and the command are ill-served when an appellant's discharge is set aside because it is based, in part, on obviously inadmissible evidence.

Summary Courts-Martial Convictions—Rule for Courts-Martial 1001(b)(3)⁵³

Summary courts-martial convictions are admissible under RCM 1001(b)(3)⁵⁴ provided an accused was afforded the opportunity to consult with counsel before accepting the summary court-martial⁵⁵ and the court-martial underwent the required Article 64,⁵⁶ Uniform Code of Military Justice (UCMJ) legal review.

In *United States v. Kahmann*,⁵⁷ the CAAF addressed the responsibilities of the trial participants in establishing compliance with the requirements of *United States v. Booker*⁵⁸ and Article 64, UCMJ⁵⁹ prior to admitting a summary court-martial conviction on sentencing.

50. *Id.*

51. *Id.* at 661.

52. *Id.* The court affirmed the findings and only so much of the sentence as provided for reduction to E-1, forfeiture of \$737 pay for one month, and fifteen days confinement. *Id.*

53. MCM, *supra* note 3, R.C.M. 1001(b)(3).

54. *Id.* Rule for Courts-Martial 1001(b) states, in part:

(3) *Evidence of prior convictions of the accused.*

(A) *In general.* The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged. In a civilian case, a "conviction" includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a "civilian conviction" does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of this rule until review has been completed pursuant to Article 64 or 66, if applicable. Evidence of the Pendency of appeal is inadmissible.

(C) *Methods of proof.* Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

Id. R.C.M. 1001(b)(3).

55. See *United States v. Kelly*, 45 M.J. 259 (1996); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980); *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978).

56. UCMJ art. 64 (2002). Article 64, UCMJ, states, in part: "(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned." *Id.* See also MCM, *supra* note 3, R.C.M. 1001(b)(3)(B); U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-45 (6 Sept. 2002) (discussing RCM 1112 reviews, the review which summary courts-martial convictions receive).

57. 59 M.J. 309 (2004). The appellant was convicted at a special court-martial of unauthorized absence and sentenced to forfeiture of \$695 pay per month for three months, ninety days confinement, and a bad conduct discharge. *Id.* at 310.

58. *Booker*, 5 M.J. at 238 (holding that a record of summary court-martial conviction may not be admitted on sentencing unless the accused was afforded the opportunity to consult, or validly waived the right to counsel, prior to imposition of the summary court-martial).

In *Kahmann*,⁶⁰ the government introduced PE 1, excerpts from the appellant's military service record, which included page 13, a document reflecting the appellant's prior punishment at a summary court-martial.⁶¹ Page 13, however, failed to reflect whether the appellant was afforded an opportunity to consult with counsel prior to the summary court-martial or whether the summary court-martial underwent a legal review as required by Article 64, UCMJ.⁶² Despite the absence of any affirmative evidence establishing compliance with *Booker*⁶³ and its progeny, or compliance with Article 64, UCMJ, the defense counsel failed to object to the admission of page 13.⁶⁴ In fact, the defense counsel conceded PE 1's admissibility.⁶⁵

On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) found that the defense counsel's failure to object waived any objection to the admissibility of page 13, absent plain error.⁶⁶ Examining the record for plain error, the NMCCA found no error, plain or otherwise.⁶⁷ The NMCCA concluded its opinion by noting that absent plain error or a timely objec-

tion, compliance with the "*Booker/Mack*" mandate and Article 64, UCMJ are presumed.⁶⁸

On appeal to the CAAF, the appellant renewed his argument that the military judge committed plain error by admitting evidence of a summary court-martial conviction when there was no evidence that (1) the appellant had an opportunity to speak with counsel prior to receiving the summary court-martial and (2) the review requirements of Article 64, UCMJ, were complied with.⁶⁹ The CAAF disagreed, affirming the lower court's decision and rationale. In reaching its decision, the CAAF first held that the "admissibility of the record from such a [summary court-martial] proceeding is governed by the objection and plain error provisions of M.R.E. 103."⁷⁰ After noting the applicability of MRE 103, the court noted the following: first, "absent objection by the defense, the prosecution is under no obligation to introduce [] evidence [of compliance with the right to counsel and the Article 64, review]"⁷¹; second, "absent timely objection, irregularities do not provide a basis for relief without a showing that any errors were plain, or obvious, or that

59. UCMJ art. 64.

60. *Kahmann*, 59 M.J. at 309.

61. *United States v. Kahmann*, 58 M.J. 667, 668-69 (N-M. Ct. Crim. App. 2003).

62. *Id.* at 669.

63. *Booker*, 5 M.J. at 238.

64. *Kahmann*, 58 M.J. at 669. The defense counsel did, however, proffer an MRE 403 objection to some information in PE 1, but not to the consideration of the conviction itself.

Counsel objected to consideration by the military judge of that portion of the document describing the offenses that did not involve absence on the grounds that such information was irrelevant, and that it was more prejudicial than probative. Counsel expressly stated that the defense objection did not preclude consideration of the summary court-martial conviction for unauthorized absence.

Kahmann, 59 M.J. at 312. See also MCM, *supra* note 3, MIL. R. EVID. 403.

65. *Kahmann*, 59 M.J. at 312.

66. *Kahmann*, 58 M.J. at 676; see also MCM, *supra* note 3, MIL. R. EVID. 103, which states in pertinent part:

- (a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
- (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or . . .
- . . .
- (d) *Plain error.* Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

MCM, *supra* note 3, MIL. R. EVID. 103.

67. *Kahmann*, 58 M.J. at 676. In examining page thirteen, the court noted that "not only is there no evidence of any 'deviation from customary practice' in the completion of page [thirteen], there is no suggestion that it was 'incomplete on its face.'" *Id.* at 674 (citing *United States v. Dyke*, 16 M.J. 426, 427 (C.M.A. 1983)).

68. *Id.* at 676.

69. *Kahmann*, 59 M.J. at 313.

70. *Id.*

71. *Id.*

they were prejudicial”⁷²; third, “[t]he opportunity to object is sufficient to protect Appellant’s rights under RCM 1001(b)(3)(B);”⁷³ and finally, “the military judge is not required to inquire on his or her own motion whether such [Article 64] review has been completed.”⁷⁴

Kahmann has modified how summary courts-martial convictions are handled at sentencing. Military judges need not sua sponte confirm compliance with *Booker* and its progeny because, absent evidence to the contrary, compliance is presumed. Defense counsel should object to the admissibility of a summary court-martial if there is any question whether the client was afforded the opportunity to speak to counsel prior to the summary court-martial or when it appears that Article 64, UCMJ, has not been complied with. Trial counsel should be ready with evidence to establish compliance with *Booker* and its progeny as well as Article 64, UCMJ, should the defense object.

Evidence—Rule for Courts-Martial 1001(b)(4)⁷⁵

Rule for Courts-Martial 1001(b)(4)⁷⁶ addresses the admissibility of evidence in aggravation, allowing the trial counsel to “present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.”⁷⁷ Stated another way, there must be some nexus, link, or causal relationship between the offense committed and the evidence being introduced.⁷⁸ The evidence contemplated and authorized by RCM 1001(b)(4) is divided into three sub-categories: victim impact evidence; mission impact evidence; and hate crime evidence.⁷⁹ Even if properly placed into one of the three 1001(b)(4) sub-categories, aggravation evidence must still survive an MRE 403 analysis.⁸⁰

The cases that will be addressed in the area of aggravation are *United States v. Gogas*,⁸¹ *United States v. Dezotell*,⁸² and *United States v. Warner*.⁸³

In *United States v. Gogas*,⁸⁴ the government offered a letter the accused sent to his congressman requesting assistance in his

72. *Id.*

73. *Id.* at 314.

74. *Id.*

75. MCM, *supra* note 3, R.C.M. 1001(b)(4).

76. *Id.*

77. *Id.* Rule for Courts-Martial 1001(b)(4) states:

Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused [victim impact evidence] and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused’s offense [mission impact evidence]. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person [hate crime evidence]. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

Id.

78. *See, e.g., United States v. Mance*, 47 M.J. 742 (N-M. Ct. Crim. App. 1997) (holding that it is improper to allow a victim of an assault and assault consummated by a battery to testify that the accused made telephonic threat and also assaulted a third when there was no evidence linking the accused to the additional crimes and they were not related to the offenses of which the accused was convicted); *United States v. Rust*, 41 M.J. 471 (1995) (stating that a suicide/homicide note was improper when there was no causal relationship between the accused’s dereliction of duty and false official statement offenses and the unforeseeable crimes of a third party); *United States v. Witt*, 21 M.J. 637 (A.C.M.R. 1985) (stating that there must be a reasonable linkage between the evidence proffered and the alleged impact of the offense).

79. *See Witt*, 21 M.J. at 637.

80. *See MCM, supra* note 3, MIL. R. EVID. 403; *see also Rust*, 41 M.J. at 478.

81. 58 M.J. 96 (2003).

82. 58 M.J. 517 (N-M. Ct. Crim. App. 2003).

83. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

84. *Gogas*, 58 M.J. at 96. The appellant was convicted at a general court-martial of wrongful use and distribution of lysergic acid diethylamide (LSD) and sentenced to reduction to E-1, eighteen months confinement, and a bad conduct discharge. *Id.* at 97.

pending court-martial. The letter stated, in part: “I was living my life with blinders on and not thinking of the consequences at the time. The only thing I was concerned with was making myself happy with using [LSD].”⁸⁵ The military judge admitted the letter, over defense objection, as aggravation evidence under RCM 1001(b)(4) and evidence of rehabilitative potential under RCM 1001(b)(5).⁸⁶ The service court affirmed, finding no abuse of discretion by the military judge.⁸⁷

On appeal, the CAAF held the letter was properly admitted under RCM 1001(b)(4) as aggravation evidence directly relating to the offenses of which the accused was convicted.⁸⁸ The court noted that the letter revealed “an aggravating circumstance: Appellant’s indifference to anything other than his own pleasure.”⁸⁹ The court went on to say “[i]ndifference to the nature or consequences of criminal conduct is an aggravating factor that may be considered in determining an appropriate sentence.”⁹⁰

The next two cases, *United States v. Dezotell*⁹¹ and *United States v. Warner*,⁹² shed further light on the limits of proper aggravation evidence under RCM 1001(b)(4).

In *Dezotell*,⁹³ the appellant was convicted at a special court-martial of unauthorized absence and missing movement. On appeal, the appellant alleged that the military judge abused his discretion⁹⁴ by admitting improper aggravation evidence from Senior Boatswain’s Mate (BMCS) Sleigh, the only aggravation

witness called by the government.⁹⁵ At the time of the appellant’s offenses, he was a member of BMCS Sleigh’s Deck Department aboard the Aircraft Carrier USS Abraham Lincoln, however, he was temporarily assigned outside the department to another part of the ship, the food services section. Senior Boatswain’s Mate Sleigh testified that the ship was undergoing “work-ups” and its “Final Examination Problem” during the appellant’s absences and that during these training cycles every sailor has a mission. When one sailor departs, other sailors have to pull that sailor’s weight, adversely affecting the mission and unit efficiency.⁹⁶ Defense counsel objected to this testimony, arguing that the witness had minimal interactions with the appellant, a fact confirmed by the witness during cross-examination, and that the testimony was not relevant. The military judge disagreed.⁹⁷

On appeal, the court found no abuse of discretion by the military judge, noting that BMCS Sleigh’s testimony “fairly stated, in contextual terms . . . the detrimental impact of the appellant’s offenses . . . on the mission and efficiency of the command.”⁹⁸ In arriving at its decision, the court found that although a “direct and logical connection or relationship between the offense and evidence offered [is required] . . . the Rule [R.C.M. 1001(b)(4)] does not require that the evidence must be of a type subject to precise measurement or quantification.”⁹⁹ Applying MRE 403, the court concluded that the aggravation evidence was unobjectionable.¹⁰⁰

85. *Id.* at 99. The letter in question also said that the charges were not provable because there was no physical evidence, only witness testimony. *Id.*

86. *Id.* at 97.

87. *United States v. Gogas*, 55 M.J. 521 (A.F. Ct. Crim. App. 2001).

88. *Gogas*, 58 M.J. at 98 (finding the letter admissible as aggravation evidence under RCM 1001(b)(4), the court did not reach the issue of whether the evidence was also admissible as rehabilitative potential evidence under RCM 1001(b)(5)).

89. *Id.* at 99.

90. *Id.*

91. 58 M.J. 517 (N-M. Ct. Crim. App. 2003).

92. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

93. *Dezotell*, 58 M.J. at 517. The appellant was sentenced to forfeiture of \$500 pay per month for two months, ninety days confinement, and a bad conduct discharge. *Id.*

94. A military judge has broad discretion in determining whether to admit evidence under RCM 1001(b)(4). *See, e.g., United States v. Humpherys*, 57 M.J. 83, 91 (2002); *United States v. Wilson*, 47 M.J. 152, 155 (1997); *United States v. Rust*, 41 M.J. 472, 478 (1995).

95. *Dezotell*, 58 M.J. at 518.

96. *Id.*

97. *Id.*

98. *Id.* at 519.

99. *Id.*

100. *Id.*

In *United States v. Warner*,¹⁰¹ the appellant was initially charged with two specifications of aggravated assault upon his two and one-half month old infant son.¹⁰² A general court-martial composed of officers and enlisted members convicted him of one specification of the lesser-included offense of assault and battery upon a child under sixteen years of age.¹⁰³ On appeal, the appellant alleged the military judge erred by allowing a medical expert, Dr. Boos, to testify on sentencing regarding the significant injuries to the child.¹⁰⁴ The appellant argued that since he was acquitted of the aggravated assault, the doctor's testimony regarding the child's injuries was improper aggravation that contradicted the member's findings.¹⁰⁵ He also argued that the evidence should have been excluded under MRE 403 as unduly prejudicial.¹⁰⁶

The service court disagreed and after applying MRE 403, found that the testimony of Dr. Boos was proper aggravation evidence in the appellant's case.¹⁰⁷ The court noted that RCM 1001(b)(4) allows the government to introduce evidence "directly relating to or resulting from the offenses of which the accused has been found guilty."¹⁰⁸ After analyzing Dr. Boos'

testimony, the court determined that the testimony, contrary to the appellant's assertions, did not relate to the use of a force likely to produce death or grievous bodily harm, as he was originally charged; rather, the testimony related directly to the injuries resulting from the assault and battery on the child and as such was proper aggravation evidence under RCM 1001(b)(4).¹⁰⁹ Additionally, the testimony was not inconsistent with the member's findings.¹¹⁰ The court noted that the panel's acquittal of the greater offenses does not support the appellant's argument that the panel believed the victim did not suffer significant injuries.¹¹¹

United States v. Gogas,¹¹² *United States v. Dezotell*,¹¹³ and *United States v. Warner*¹¹⁴ highlight that aggravation evidence is broad in scope, need not be subject to precise measurement and is not necessarily constrained by the court's announced findings.¹¹⁵ Trial counsel should be creative in both their search for aggravation evidence as well as their arguments in support of the admission thereof. Remember, "indifference to anything other than [one's] own pleasure"¹¹⁶ or to the "nature or consequences of criminal conduct"¹¹⁷ is proper aggravation. Like-

101. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

102. *Id.* at 574. The aggravated assault charge was "with a means or force likely to produce death or grievous bodily harm." *Id.*

103. *Id.* The panel sentenced the appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for eighteen months, and a bad conduct discharge. *Id.*

104. *Id.* at 581.

105. *Id.* "[T]he appellant argue[d] that Dr. Boos's testimony concerning the significant injuries BT [the child victim] sustained was inconsistent with the court members' findings that the appellant did not use 'a force likely to produce death or grievous bodily harm.'" *Id.*

106. *Id.*

107. *Id.* at 581-82. Regarding the military judge's MRE 403 ruling, the court, reviewing the military judge's ruling for an abuse of discretion, first noted that the military judge's failure to place his analysis on the record deprived him of the "heightened deference" given a judge when the analysis is placed on the record. *Id.* at 581. Regardless, after applying the less deferential standard of review for abuse of discretion, the court found that the military judge did not abuse his discretion in admitting the doctor's testimony. *Id.* at 582.

108. *Id.* (quoting *United States v. Gogas*, 58 M.J. 96, 98 (2003)).

109. *Id.* Dr. Boos's testimony was "directly related to the appellant's actions in 'shaking and grabbing' his son." *Id.*

110. *Id.*

111. *Id.* "It was not 'necessarily inferable' from the verdict that the court members did not believe BT had significant injuries." *Id.* (quoting *United States v. Terlep*, 57 M.J. 344, 348 (2002)).

112. *Gogas*, 58 M.J. at 96.

113. 58 M.J. 517 (N-M. Ct. Crim. App. 2003).

114. *Warner*, 59 M.J. at 573.

115. *See id.*; *see also* *United States v. Terlep*, 57 M.J. 344 (2002). Staff Sergeant Terlep was initially charged with wrongful use and distribution of marijuana, burglary, and rape. Pursuant to a pretrial agreement, he plead guilty at a general court-martial to wrongful use and distribution of marijuana, unlawful entry and assault consummated by a battery, however, the victim's testimony regarding rape was admissible. Neither the plea agreement nor the stipulation of fact precluded the evidence. In affirming the case, the CAAF noted that a plea agreement in a case, absent express language to the contrary, does not, and should not, prevent the trier of fact from knowing and fully appreciating the "true plight of the victim in each case." *Id.* at 350.

116. *Gogas*, 58 M.J. at 99.

117. *Id.*

wise, the increased workload on fellow Soldiers, Sailors, Airmen, Marines, or Coast Guardsmen is proper aggravation evidence in the form of mission impact. Defense counsel should be aware that aggravation evidence is broadly construed and should be ready to object to the government's aggravation evidence as irrelevant under MRE 401¹¹⁸ and RCM 1001(b)(4).¹¹⁹ If the military judge rules against the relevance objection, defense counsel should argue that MRE 403¹²⁰ requires exclusion.

Rehabilitative Potential Evidence—Rule for Courts-Martial 1001(b)(5)¹²¹

Rule for Courts-Martial 1001(b)(5)¹²² allows the government to present evidence regarding an accused's potential for rehabilitation, a term referring to the "accused's potential to be

restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."¹²³ A witness providing an opinion under this rule must have a "foundation"¹²⁴ for the opinion, the opinion must have a proper "bases,"¹²⁵ and finally, the opinion must be limited in "scope."¹²⁶ A government rehabilitative potential witness cannot testify that he or she believes a punitive discharge is warranted or that the accused should not be returned to his unit, the latter simply being a euphemism for "discharge the soldier."¹²⁷ Arguably, the same rules apply to defense witnesses who would conversely testify that the accused should be retained or returned to his unit or that the witness would "be willing to serve with the accused again."¹²⁸

*United States v. Warner*¹²⁹ and *United States v. Griggs*¹³⁰ address the issue of rehabilitative potential from the government and defense perspective, the former seeking the introduc-

118. See MCM, *supra* note 3, MIL. R. EVID. 401.

119. *Id.* R.C.M. 1001(b)(4).

120. See *id.* MIL. R. EVID. 403.

121. *Id.* R.C.M. 1001(b)(5).

122. *Id.*

123. *Id.*

124. Rule for Courts-Martial 1001(b)(5)(B) states:

Foundation for opinion. The witness or deponent providing opinion evidence regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

Id. R.C.M. 1001(b)(5)(B). See also *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

125. Rule for courts-Martial 1001(b)(5)(C) states:

Bases for opinion. An opinion regarding the accused's rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential.

MCM, *supra* note 3, R.C.M. 1001(b)(5)(C). See also *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

126. Rule for Courts-Martial 1001(b)(5)(D) states:

Scope of opinion. An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit.

MCM, *supra* note 3, R.C.M. 1001(b)(5)(C). See also *United States v. Williams*, 50 M.J. 397 (1999); *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990).

127. MCM, *supra* note 3, R.C.M. 1001(b)(5)(C); see also *United States v. Williams*, 50 M.J. 397 (1999); *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990); *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Yerich*, 47 M.J. 615 (Army Ct. Crim. App. 1997).

128. See *United States v. Ramos*, 42 M.J. 392 (1995) (noting mirror image of RCM 1001(b)(5)(D) prohibition appears to apply to the defense); *United States v. Hoyt*, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App., July 5, 2000) (unpublished) (stating that a defense witness cannot comment on appropriateness of discharge), *pet. denied*, 54 M.J. 365 (2000); see also *United States v. Griggs*, 59 M.J. 712 (A.F. Ct. Crim. App. 2004). But see *United States v. Bish*, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (stating that RCM 1001(b)(5) is a government rule and does not appear to apply to the defense).

129. 59 M.J. 590 (C.G. Ct. Crim. App. 2003).

tion of testimonial evidence that the appellant lacks any potential for continued military service; the latter seeking the admission of written evidence recommending retention of the appellant.

In *Warner*,¹³¹ during his sentencing case, the appellant called his civilian supervisor who previously served four years on active duty in the Coast Guard before being honorably discharged. On direct examination, the witness testified that the appellant was an excellent worker. When asked by the defense counsel if he had an opinion about the appellant's rehabilitative potential, the witness testified that the appellant "had 'taken the right steps . . . to better his future after the Coast Guard.'"¹³² On cross-examination, the trial counsel asked the defense witness if he was familiar with the "'Coast Guard's drug policy' and whether [the] Appellant had 'rehabilitative potential, in the Coast Guard, given his drug abuse?'"¹³³ When the witness' opinion did not change, the trial counsel asked the witness whether he understood that drug use was "'contrary to the [Coast Guard's] core mission'" and could adversely affect unit efficiency and the command.¹³⁴ At this point, the defense counsel objected arguing that the trial counsel was eliciting improper aggravation evidence, an objection the military judge overruled.¹³⁵

On appeal,¹³⁶ the Coast Guard court found the trial counsel erred in his rehabilitation potential cross-examination of the defense witness.

We believe that trial counsel, intentionally or unintentionally, improperly linked the wit-

ness' opinion on rehabilitative potential with award of a punitive discharge when she focused on Appellant's "rehabilitative potential in the Coast Guard," and referred to the "Coast Guard's drug policy" and incompatibility of drug use with a Coast Guard "core mission."¹³⁷

Despite finding error, the court held it was harmless since the witness' opinion remained unchanged after cross-examination and the trial was before a military judge alone, an individual "presumed to know and follow the constraints of [*United States v. Ohrt* [28 M.J. 301 (C.M.A. 1989)] and RCM 1001(b)(5)."¹³⁸

In *Griggs*,¹³⁹ during an Article 39(a) session while the members were deliberating on findings, the appellant offered six character letters from noncommissioned officers.¹⁴⁰ The letters followed the same general format: paragraph one indicated that the author was familiar with the appellant and the charges against him; paragraph two described the appellant's duty performance and highlighted the appellant's favorable character traits; and paragraph three, the final paragraph, addressed the appellant's rehabilitative potential.¹⁴¹ The final paragraph of all six letters contained material that the trial counsel objected to, arguing that the comments were recommendations for retention and would confuse the members.¹⁴² The relevant language was as follows:

[Letters 1, 2 and 3] I have no doubt Sr A Griggs will continue to be an asset to the mission of the squadron and Air Force. I ask the

130. *Griggs*, 59 M.J. at 712.

131. *Warner*, 59 M.J. at 590. The appellant was convicted at a special court-martial of unauthorized absence and wrongful use of Ecstasy and methamphetamine and was sentenced to a bad conduct discharge. *Id.* at 590-91.

132. *Id.* at 594.

133. *Id.*

134. *Id.*

135. *Id.*

136. Note—the case was submitted "on the merits," meaning no issues were raised by appellate counsel. Despite affirming the findings and sentence, the court believed the case raised "several issues [warranting] further discussion," one of which was the cross-examination of a defense witness improperly linking the witness' rehabilitative potential opinion testimony to a punitive discharge. *Id.* at 590-91.

137. *Id.* at 595.

138. *Id.*

139. 59 M.J. 712 (A.F. Ct. Crim. App. 2004). The appellant was convicted at a general court-martial of two specifications of wrongful use of Ecstasy, two specifications of wrongful distribution of Ecstasy, and one specification of wrongful use of marijuana and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for 150 days, and a bad conduct discharge. *Id.* at 713.

140. *Id.*

141. *Id.*

142. *Id.*

panel [to give Sr A Griggs] a second chance to be a productive member of the United States Air Force.

[Letter 4] In fact, I have two airmen I'd gladly trade just to keep him. I feel the Air Force could use more airmen like him.

[Letter 5] I continue to hear, "This is not a one mistake Air Force"

[Letter 6] [I] am convinced that he . . . can still be of great potential to the United States Air Force We seem to . . . toss [young airmen] out after investing so much time, effort and money.¹⁴³

Notwithstanding the Air Force Court of Criminal Appeals (AFCCA) decision in *United States v. Bish*,¹⁴⁴ holding that RCM 1001(b)(5) is a "Government rule," the defense counsel conceded the rule's applicability to its six character letters.¹⁴⁵ In sustaining the trial counsel's objection and ordering the objectionable language redacted, the military judge noted that the language would confuse the members.¹⁴⁶ He also noted that RCM 1001(b)(5)(D) prohibited opinion testimony regarding whether an accused should be discharged or returned to his unit.¹⁴⁷

On appeal, the appellant argued that the military judge abused his discretion by applying RCM 1001(b)(5), a government-only rule, to his six character letters and ordering the "objected to" language redacted.¹⁴⁸ The service court dis-

agreed. Although RCM 1001(b)(5)(D) appears under the section entitled "Matter to be presented by the prosecution,"¹⁴⁹ a "strict textual interpretation of this provision . . . ignores the long and nuanced history of the rules governing opinion testimony about an accused's rehabilitative potential."¹⁵⁰ The court noted that the rules and limitations regarding opinion testimony by a government witness "balance several important interests"¹⁵¹ including: insertion of improper command influence into the process; confusion of the members; usurping the role of the sentencing authority; ensuring that the witness rendering an opinion has a proper foundation; and avoiding improper reference to uncharged misconduct on direct examination.¹⁵² Considering these interests, the court concluded that the "risk of confusion, usurpation of the sentencing authority's role, and foundational requirements logically apply to the defense as well as the prosecution."¹⁵³ Next, the court addressed the guidance in *United States v. Ohrt*, indicating that whether a service member should be discharged, or retained, is a matter within the purview of the court-martial and "cannot be usurped by a witness."¹⁵⁴

Finally, the court considered that RCM 1001(c)(1)(B),¹⁵⁵ which addresses evidence in mitigation, is silent regarding whether a defense witness can render an opinion recommending that an accused remain in the military. After considering the general limitations on opinion testimony and the rationale behind those limitations, the CAAF's (then the Court of Military Appeal's) guidance regarding rehabilitative potential testimony, RCM 1001(c)(1)(B), and defense counsel's concession

143. *Id.* Regarding letters one through three, the trial counsel noted he would have no objection if the language was changed from "productive member of the United States Air Force" to "productive member of the society," a recommended change the defense opted not to make. *Id.*

144. 54 M.J. 860, 863 (A.F. Ct. Crim. App. 2001), *pet. denied*, 55 M.J. 372 (2001).

145. *Griggs*, 59 M.J. at 713.

146. *Id.*

147. *Id.*

148. *Id.*

149. MCM, *supra* note 3, R.C.M. 1001(b).

150. *Griggs*, 59 M.J. at 714.

151. *Id.*

152. *Id.*

153. *Id.*

154. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

[A] witness be he for the prosecution or the defense should not be allowed to express an opinion whether an accused should be punitively discharged. The question of appropriateness of punishment is one, which must be decided by the court-martial; it cannot be usurped by a witness. Thus for the same reasons that we do not permit an opinion of guilt or innocence, or of "truthfulness" or "untruthfulness" of witnesses, we do not allow opinions as to appropriate sentences The use of euphemisms, such as "No potential for continued service"; "He should be separated"; or the like are just other ways of saying, "Give the accused a punitive discharge."

Id. at 304. See also *United States v. Ramos*, 42 M.J. 392, 396 (1995).

regarding the applicability of RCM 1001(b)(5)(D), the court found the decision to redact the language in question was not an abuse of discretion.¹⁵⁶ Assuming *arguendo* that the military judge did err, the court found any error to be harmless.¹⁵⁷ The unredacted portions of the statements sufficiently conveyed the witnesses' opinions about the appellant, painting a positive picture of the appellant's military service, and the redacted language added little significance to the statements.

*Warner*¹⁵⁸ and *Griggs*¹⁵⁹ are good refresher cases on the admissibility of, and limits on, rehabilitative potential evidence. *Warner*¹⁶⁰ highlights that cross-examination of a rehabilitative potential witness cannot seek an impermissible opinion on whether the appellant should be discharged or retained. *Griggs*¹⁶¹ highlights the fact that defense submissions that render opinions on retention are objectionable. Although the Air Force court has held that RCM 1001(b)(5) is a "Government" rule¹⁶² and notwithstanding the defense's concession of RCM 1001(b)(5)'s applicability in *Griggs*,¹⁶³ the rationale used by the *Griggs* court in concluding that rehabilitative potential opinions are limited in scope, regardless of which side seeks the opinion, is compelling. Trial counsel should use this rationale to object to opinions by defense witnesses arguing for retention.

The Unsworn Statement—Rule for Courts-Martial 1001(c)(2)(C)¹⁶⁴

Once the government finishes presenting its case via RCM 1001(b),¹⁶⁵ it is the defense's turn. Rule for Courts-Martial 1001(c)¹⁶⁶ governs the defense's presentation of evidence in

extenuation,¹⁶⁷ mitigation,¹⁶⁸ and rebuttal,¹⁶⁹ including the accused's unsworn statement.¹⁷⁰

The cases discussed in this section address the accused's right to make an unsworn statement, a right, which, although broad and virtually unfettered,¹⁷¹ is not without limitations. *United States v. Sowell*¹⁷² and *United States v. Johnson*¹⁷³ are cases in which the military judge imposed limitations on the appellant's right to make an unsworn statement. A third case, *United States v. Adame*,¹⁷⁴ while not ground breaking, is a reminder to all trial participants on the cross-examination limitations associated with the unsworn statement.

In *Sowell*,¹⁷⁵ the appellant wanted to tell the enlisted panel during sentencing that one co-conspirator, Fire Controlman Third Class (FC3) Elliott, was acquitted at an earlier court-martial of two identical specifications for which the appellant was convicted.¹⁷⁶ The trial counsel objected and the military judge sustained the objection, finding that the mention of the co-conspirator's acquittal in her unsworn would be a "a direct impeachment of the members' determination."¹⁷⁷ The military judge did, however, allow the appellant to mention that FC3 Elliott "went to a court-martial."¹⁷⁸

On appeal, the appellant alleged that the military judge abused his discretion in preventing her from mentioning her co-conspirator's acquittal.¹⁷⁹ The service court agreed, noting "the appellant's right of allocution is so significant that it has few limitations" and "the trend is clearly toward an expansive view of what can be included in unsworn statements."¹⁸⁰ As for the appellant's ability to mislead or confuse the members with her unsworn statement, the court focused on the military judge's

155. MCM, *supra* note 3, R.C.M. 1001(c)(1)(B). Rule for Courts-Martial 1001(c)(1)(B) states:

Matter in mitigation. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

Id.

156. *Griggs*, 59 M.J. at 715.

157. *Id.* at 715-16.

158. 59 M.J. 590 (C.G. Ct. Crim. App. 2003).

159. *Griggs*, 59 M.J. at 712.

160. *Warner*, 59 M.J. at 590.

161. *Griggs*, 59 M.J. at 712.

162. See *United States v. Bish*, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (stating that RCM 1001(b)(5) is a government rule and does not appear to apply to the defense).

163. *Griggs*, 59 M.J. at 713.

164. MCM, *supra* note 3, R.C.M. 1001(c)(2)(C).

165. *Id.* R.C.M. 1001(b).

ability to tailor an appropriate instruction to avoid such a situation.¹⁸¹ Finding prejudice, the court set aside the sentence and authorized a rehearing.¹⁸²

United States v. Johnson,¹⁸³ the second case in which the military judge limited the appellant's unsworn statement, provides guidance to trial practitioners on circumstances justifying limiting the accused's right of allocution.

In *Johnson*,¹⁸⁴ after being found guilty of wrongfully possessing marijuana with the intent to distribute, the appellant wanted to tell the panel members that he passed a polygraph examination in which he indicated he was unaware that he possessed marijuana.¹⁸⁵ The military judge, however, ruled that the mention of the polygraph examination was not proper mitigation under RCM 1001(c) and was an improper attempt to impeach the verdict through the unsworn statement.¹⁸⁶ In addi-

166. *Id.* R.C.M. 1001(c). Rules for Courts-Martial 1001(c), entitled "Matters to be presented by the defense, states, in part:

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the Accused.* The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both and may be made by the accused, counsel, or both.

Id.

167. *Id.* R.C.M. 1001(c)(1)(A).

168. *Id.* R.C.M. 1001(c)(1)(B).

169. *Id.* R.C.M. 1001(c)(1).

170. *Id.* R.C.M. 1001(c)(2)(C).

171. *See, e.g.,* United States v. Jeffery, 48 M.J. 229 (1998); United States v. Britt, 48 M.J. 233 (1998).

172. 59 M.J. 552 (N-M. Ct. Crim. App. 2003).

173. 59 M.J. 666 (A.F. Ct. Crim. App. 2003).

174. 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

175. *Sowell*, 59 M.J. at 552. The appellant was convicted at a special court-martial of conspiracy to steal two computers and larceny of the same two computers, property of a value of approximately \$1,100 and sentenced to a \$550 fine, thirty days confinement, and a bad conduct discharge. *Id.* at 553.

176. *Id.* at 554. Four sailors were involved in the conspiracy to steal computers, the appellant, Fire Controlman Third Class Elliott, Airman Apprentice (AA) Schwey, and Seaman (SN) Cormier. Fire Controlman Third Class Elliott was charged with conspiracy and acquitted. Neither AA Schwey nor SN Cormier were charged or disciplined for their involvement in the conspiracy, however, both sailors were administratively separated before the appellant's trial. *Id.* at 553-54.

177. *Id.* at 554. *See also* MCM, *supra* note 3, R.C.M. 923. "Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member." *Id.*

178. *Sowell*, 59 M.J. at 554. The military judge also allowed the appellant to tell the members that neither AA Schwey nor SN Cormier were charged with any offenses. *Id.*

179. *Id.* at 553.

180. *Id.* at 555. "We further note that, in recent years, our superior court has consistently found error when the military judge limited the contents of an unsworn statement." *Id.*

tion to finding that the polygraph was not proper mitigation evidence, the military judge found that MRE 707¹⁸⁷ specifically prohibited mention of the polygraph.¹⁸⁸

On appeal, the appellant argued that the military judge abused his discretion by improperly limiting his unsworn statement. In support of his position, the appellant argued that his purpose in mentioning the polygraph was not to impeach the verdict, rather “to show ‘the emotional roller coaster’ he was forced to endure before trial.”¹⁸⁹ Finding no abuse of discretion

on the part of the military judge, the court first noted that limits on an unsworn statement are the exception rather than the norm.¹⁹⁰ Although broad in scope, the court noted that the right of allocution is not wholly unconstrained.¹⁹¹ Under the facts of this case, a case in which a specific rule, MRE 707, excluded the evidence sought to be admitted, the only logical purpose in mentioning the polygraph was to impeach the verdict, a purpose that goes neither to extenuation nor mitigation.¹⁹² The lack of a valid RCM 1001(c) purpose coupled with a specific rule precluding admissibility results in evidence that is inadmissible

181. *Id.* at 556.

Our superior court has expressed confidence that military judges are able to tailor instructions to avoid confusing and misleading the court members with information contained in unsworn statements. “Military judges have broad authority to give instructions on the ‘meaning and effect’ of the accused’s unsworn statement, both to ensure that the members place such a statement ‘in the proper context’ and ‘to provide an appropriate focus for the members’ attention on sentencing.” *United States v. Tschip*, 58 M.J. 275 (C.A.A.F.2003) (quoting *Grill*, 48 M.J. at 133).

The U.S. Air Force Court of Criminal Appeals has approved a tailored instruction for situations in which the accused discusses the results of related cases or other such matters in his unsworn statement. *United States v. Friedmann*, 53 M.J. 800 (A.F.Ct.Crim.App.2000), *rev. denied*, 54 M.J. 425 (C.A.A.F.2001). “When an accused uses his virtually unrestricted unsworn statement to raise issues for the members to consider, the military judge does not err in providing the court members accurate information on how to appropriately consider those matters in their deliberations.” *Friedmann*, 53 M.J. at 803-04.

Id.

182. *Id.* at 558. Judge Ritter dissented finding that the acquittal of a co-conspirator is legally irrelevant under RCM 1001(c) since it does not relate to extenuation, mitigation, or rebuttal. He also expressed concern that the court’s decision would “open a ‘Pandora’s box’ of mischief, by eliminating one of the very few clear limitations on unsworn statements [referring to relevance as limited by extenuation, mitigation, or rebuttal evidence].” *Id.* at 560.

183. 59 M.J. 666 (A.F. Ct. Crim. App. 2003).

184. *Id.* The appellant was tried and convicted at a general court-martial, contrary to his plea, of wrongfully possessing seventeen pounds of marijuana with the intent to distribute and sentenced to reduction to E-1, forfeiture of all pay and allowances, six months confinement, and a dishonorable discharge. *Id.* at 667.

185. *Id.* at 674. The relevant portion of the appellant’s proposed unsworn statement follows:

Never in my wildest dreams did I ever once imagine that my life would end here in your hands especially after I took and passed a polygraph. I was asked point blank if I knew there was marijuana in the box to which I responded no. The polygrapher found no deception with my answers. I was hopeful at that point that based on the fact that I did pass, I would not face charges again; however, that was not to be and now my future is in your hands.

Id. (the polygrapher referred to was privately retained by the defense).

186. *Id.*

I find that the rule [R.C.M. 1001(c)] does not allow an Accused, in an unsworn statement, to impeach the verdict of the court. The ruling is that the Accused may not make a statement which the logical consequence is that he is telling the members that he is not guilty of the offense.

Id.

187. See MCM, *supra* note 3, MIL. R. EVID. 707. “Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.” *Id.* MIL. R. EVID. 707(a).

188. *Johnson*, 59 M.J. at 674; see also MCM, *supra* note 3, MIL. R. EVID. 707. “Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.” MCM, *supra* note 3, MIL. R. EVID. 707(a).

189. *Johnson*, 59 M.J. at 675.

190. *Id.* “Under the current state of the law, exclusion of objectionable material from an unsworn statement should be the exception and not the norm. This does not mean, however, that an accused’s right to say whatever he wants is wholly unconstrained.” *Id.*

191. *Id.*

192. *Id.* at 675-76.

even in the context of an unsworn statement with a properly tailored limiting instruction.¹⁹³

The last unsworn statement case is *United States v. Adame*,¹⁹⁴ a gentle reminder to trial practitioners that an accused's unsworn statement is not a proper matter for cross-examination, even if done by a military judge in a judge-alone trial.

In *Adame*,¹⁹⁵ the appellant, as part of his unsworn statement stated, among other things, "I do believe it would be in the best interest of the Marine Corps that I be discharged."¹⁹⁶ Defense counsel argued, in part, "[W]e think it is appropriate that you allow [the appellant] to go back to his family and take care of both of them."¹⁹⁷ The military judge then asked the appellant and his counsel about the appellant's desire for a punitive discharge. The following colloquy transpired:

MJ: Thank you, [DC] . . . are you advocating for a punitive discharge?

DC: No, sir. I am advocating that my client's unsworn statement be taken into consideration.

MJ: . . . [H]ave you talked to PFC Adame about the consequences of a punitive discharge?

DC: I have extensively, sir.

MJ: *Have you tried to talk him out of a punitive discharge?*

DC: Yes, sir.

MJ: *PFC Adame, is that correct?*

ACC: Yes, sir.

MJ: So in this regard, at least as far as a punitive discharge, [DC's] advice to you has been that it is not in your best interest?

ACC: Yes, sir.

MJ: *You desire a punitive discharge regardless of that advice?*

ACC: (No response)

MJ: *Do you think you could complete your enlistment contract if you are not discharged?*

ACC: No, sir.¹⁹⁸

On appeal, the appellant argued that the military judge erred when he questioned him and his counsel about his desire for a punitive discharge. The court agreed, describing the military judge's questioning of the appellant and his counsel as "invasive,"¹⁹⁹ by asking the appellant and counsel to "reveal confidential communications."²⁰⁰ Although a military judge must confirm that an accused desires a punitive discharge when counsel argues for one, the military judge should do so in a manner so as not to expose protected attorney-client communications.²⁰¹ Additionally, the colloquy raised concerns that the military judge was cross-examining the appellant on his unsworn statement, an examination that RCM 1001(c)(2)(C) specifically prohibits.²⁰² Despite finding error in both the disclosure of protected communications as well as the cross-examination of the accused on his unsworn statement, the court found no prejudice.²⁰³

Trial counsel seeking to limit an accused's unsworn statement should pay careful attention to the guidance provided by the courts in *Sowell*²⁰⁴ and *Johnson*,²⁰⁵ as well as the cases cited therein. Starting with the premise that the unsworn statement is

193. *Id.*

194. *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

195. *Id.* The appellant was convicted at a special court-martial of unauthorized absence and sentenced to reduction to E-1, forfeiture of \$600 pay per month for two months, seventy-five days confinement, and a bad conduct discharge. *Id.* at 813.

196. *Id.*

197. *Id.*

198. *Id.* at 813-14.

199. *Id.* at 813.

200. *Id.* at 814.

201. *Id.* at 814-15; *see also* *United States v. Evans*, 35 M.J. 754 (N.M.C.M.R. 1992); U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES, MILITARY JUDGES' BENCHBOOK Instr. 2-5-22 (1 Apr. 2001) [hereinafter DA PAM 27-9].

202. *Adame*, 57 M.J. at 814-15; *see also* MCM, *supra* note 3, R.C.M. 1001(c)(1)(C).

203. *Adame*, 57 M.J. at 815. In finding no prejudice, the court focused on the following: the appellant received exactly what he asked for, a bad conduct discharge; the facts of the case, an eight month period of unauthorized absence coupled with a prior disciplinary history, warranted a punitive discharge; and most importantly, neither the appellant nor his appellate counsel provided the court with any information indicating he no longer desired a punitive discharge. *Id.*

204. 59 M.J. 552 (N-M. Ct. Crim. App. 2003).

205. 59 M.J. 666 (A.F. Ct. Crim. App. 2003).

a broad,²⁰⁶ largely unfettered right,²⁰⁷ any effort by the government to limit this right will be strictly scrutinized. If the accused's unsworn statement seeks to mention what happened to co-accuseds, trial counsel should think twice before objecting, otherwise the government may see the case again when the appellate court orders a rehearing on sentencing several years later. If, on the other hand, the proposed unsworn statement seeks to impeach the verdict or is specifically prohibited by a RCM, MRE, or other regulatory or statutory provision, trial counsel should object. Defense counsel should prepare the client for the military judge's inevitable inquiry in all cases in which the client or counsel has asked for a discharge, as was the case in *Adame*.²⁰⁸ More importantly, when the military judge's inquiry seeks disclosure of confidential attorney-client communications, defense counsel should object, advising the client not to answer the military judge's questions.

The Case in Rebuttal—Rule for Courts-Martial 1001(d)²⁰⁹

Now that both sides have finished presenting their cases, where do we go from here? Most of the time we go right to instructions,²¹⁰ but every now and then we end up in the land of the "last word," an area also known as rebuttal and surrebuttal.

Rule for Courts-Martial 1001(d) allows both the government and defense to present evidence in rebuttal and surrebuttal

respectively. Counsel, however, need to be aware of the limitation on the introduction of extrinsic evidence. Therefore, military practitioners seeking to venture to the land of the "last word" should be familiar with *United States v. Henson*²¹¹ and *United States v. Saferite*.²¹²

In *Henson*,²¹³ the defense presented opinion evidence regarding the appellant's good military character. While cross-examining two of the defense witnesses, the trial counsel asked each witness if they knew that the appellant had stolen a microwave and pawned it for spending money.²¹⁴ One witness said he was aware of the misconduct and the other was not sure.²¹⁵ In rebuttal to the defense's good military character evidence, the trial counsel called the appellant's former roommate who offered extrinsic evidence surrounding the wrongful taking.²¹⁶ The trial counsel also called the appellant's First Sergeant (1SG), 1SG M, who testified to the following: that the appellant's military appearance was substandard; that the appellant had a problem keeping his room clean; that the appellant hung a monkey from a noose that "could have affected racial harmony within the unit;" and that the appellant wore clothing, to include a hat and t-shirts, that were "'always about alcohol or drugs.'"²¹⁷ Finally, the trial counsel called the appellant's former squad leader who testified about the following: that the appellant's appearance was substandard; that the appellant was overweight; and that the appellant recently quit during the Army Physical Fitness Test.²¹⁸ The defense counsel objected to

206. See, e.g., *United States v. Britt*, 48 M.J. 233 (1998).

207. See, e.g., *United States v. Grill*, 48 M.J. 233 (1998).

208. *Adame*, 57 M.J. at 812.

209. MCM, *supra* note 3, R.C.M. 1001(d). Rule for Courts-Martial 1001(d) states:

Rebuttal and surrebuttal. The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

Id.

210. See *id.* R.C.M. 1005.

211. 58 M.J. 529 (Army Ct. Crim. App. 2003).

212. 59 M.J. 270 (2004).

213. *Henson*, 58 M.J. at 529. The appellant was convicted at a general court-martial (judge alone) of conspiracy to commit larceny and two specifications of larceny and sentenced by a military judge to reduction to E-1, eighteen months confinement, and a bad conduct discharge. The military judge also recommended that the convening authority approve only ten months confinement if the appellant paid \$400 to each of the three testifying victims, which the appellant did. At action, the convening authority followed the military judge's clemency recommendation and approved only so much of the sentence as provided for reduction to E-1, ten months confinement, and a bad conduct discharge. *Id.*

214. *Id.* at 530.

215. *Id.*

216. *Id.* at 530-31.

217. *Id.*

218. *Id.*

both the roommate's and 1SG's testimony; however, he did not object to the former squad leader's testimony.²¹⁹ Despite the defense counsel's objections to the introduction of extrinsic evidence, the military judge allowed the extrinsic evidence to rebut the good character and reputation evidence presented by the defense.²²⁰

On appeal, the service court held the military judge abused her discretion by allowing extrinsic evidence to rebut evidence of good military character and reputation.²²¹ After acknowledging the right of rebuttal found in RCM 1001(d), the court noted the difference between rebutting specific good acts with extrinsic evidence that the purported acts did not occur vice rebutting opinion and reputation evidence with specific acts of uncharged misconduct; the former is permissible while the latter is not.²²² Finding error, the court then looked to whether the appellant was prejudiced by the error.²²³ Despite a finding of no prejudice, a finding based largely on the military judge's clemency recommendation and the convening authority's decision to follow that recommendation, the court nonetheless reduced the appellant's period of confinement from ten to nine months to "moot any claim of possible prejudice."²²⁴

In *United States v. Saferite*,²²⁵ the defense presented an unsworn statement from the appellant's wife wherein she stated she loved her husband, he was a "caring father and supportive

husband," and she depended on him.²²⁶ The unsworn statement ended with a "passionate plea for compassion for the Appellant."²²⁷ In rebuttal, the trial counsel offered two sworn statements, PEs 141 and 142, the former stating that the wife spoke with the appellant telephonically while he was in pretrial confinement and the latter stating that "approximately 40 minutes after [the] Appellant escaped from custody, Ms. Scholzen [the wife] was stopped by military authorities in the middle of the night as she was driving off Spangdahlem Air Base at a high rate of speed."²²⁸ The government's rationale in offering the documents was to attack the wife's credibility and establish bias. The government argued that the two statements "'tend to establish that circumstantially [the wife] was materially involved in the escape of the accused from pretrial confinement.'"²²⁹ The defense counsel objected, noting that the evidence was both irrelevant and unduly prejudicial, an objection that the military judge overruled.²³⁰

On appeal to the CAAF, the appellant renewed his objection to PEs 141 and 142 as improper rebuttal evidence, arguing that the evidence "did not 'explain, repel, counteract or disprove'" anything in the wife's letter (i.e., the wife's unsworn statement).²³¹ Additionally, the appellant argued that the evidence did not establish bias.²³² Finally, the appellant argued that the evidence was unduly prejudicial in that it allowed the trial counsel to refer to uncharged misconduct, that is, the appel-

219. *Id.*

220. *Id.*

221. *Id.* at 532.

222. *Id.* at 531.

It is clear that "[t]he prosecution may rebut matters presented by the defense" during presentencing proceedings. Rule for Courts-Martial [hereinafter R.C.M.] 1001(d). For example, the prosecution could rebut evidence of "particular acts of good conduct or bravery" by an accused admitted under the provisions of R.C.M. 1001(c)(1)(B) with contradictory evidence that the acts did not occur. However, a military judge abuses her discretion when she allows the government to rebut opinion or reputation evidence of good character with extrinsic evidence of misconduct by the appellant.

Id.

223. *Id.* at 532.

224. *Id.* at 533.

225. 59 M.J. 270 (2004). The appellant was tried and sentenced in absentia. Despite being placed in pretrial confinement, he escaped from his guards while being held overnight at Spangdahlem Air Base where he was brought to consult with counsel and participate in his trial proceedings. The appellant was convicted of three specifications of attempting to sell military property, eight specifications of selling military property, and twelve specifications of larceny of military property, and sentenced to reduction to E-1, confinement for six years, a dishonorable discharge and a fine of \$14,565 and to be further confined for not more than one year if the fine was not paid. The total estimated loss to the United States from the appellant's larcenies exceeded \$100,000. *Id.* at 271.

226. *Id.* at 272.

227. *Id.*

228. *Id.* (stating that the appellant was not in his wife's vehicle).

229. *Id.*

230. *Id.* On appeal to the service court, the court found that the military judge did not abuse his discretion in admitting the evidence to show bias because of the wife's "willingness to engage in criminal activity to support [the] Appellant." *Id.* at 272-73.

lant's escape from pretrial confinement, in his sentencing argument.²³³ The CAAF agreed, finding that the military judge "clearly abused his discretion" in admitting PEs 141 and 142.²³⁴

In reaching its decision, the court first addressed the issue of bias and MRE 608,²³⁵ noting that "[a]lthough extrinsic evidence of specific acts of misconduct may not be used to prove a witness's general character for truthfulness, it may be used to impeach a witness by showing bias."²³⁶ Next, the court laid out several basic tenets regarding rebuttal evidence: first, "the legal function of rebuttal evidence . . . is to 'explain, repel, counteract or disprove the evidence introduced by the opposing party'";²³⁷ and second, "[t]he scope of rebuttal is defined by [the] evidence introduced by the other party."²³⁸ Examining the proffered rebuttal evidence against MRE 403, the court found its probative value was minimal. The court described the evidence supporting the wife's alleged complicity in her husband's escape as "tenuous at best."²³⁹ As for her bias, it was clear from her unsworn statement that she was biased towards her husband and PEs 141 and 142 were "merely cumulative on the issue of her bias."²⁴⁰ After finding the probative value was minimal, the court next examined the danger of unfair prejudice, finding it was high, especially because the trial counsel focused on the wife's alleged complicity during his sentencing argument "notwithstanding the factual deficiency to link [the wife] to [the] Appellant's escape."²⁴¹ Despite finding error, the court found the admission of PEs 141 and 142 to be harmless.²⁴²

Trial practitioners trying to get in the last word via rebuttal or surrebuttal need to first focus on what they are trying to

accomplish. If the goal is rebuttal of opinion or reputation evidence, extrinsic evidence is not allowed. If the goal is to rebut specific acts with evidence that the acts did not occur or to establish bias, extrinsic evidence is permissible provided the evidence survives an MRE 403 objection. Trial counsel should be ready to articulate the theory of admissibility for any rebuttal evidence and should be prepared for the inevitable MRE 403 objection. Defense counsel should argue that the evidence sought to be admitted is legally irrelevant in that it does not "explain, repel, counteract or disprove" any of the offered defense evidence. If the military judge disagrees with the relevance objection, defense counsel should argue that MRE 403 prohibits the evidence because it is unduly prejudicial. Finally, if the relevance and prejudice objections are overruled, defense counsel should, in a members case, draft a limiting instruction for the military judge to give the members. As the next section explains, failure to give an accurate, requested instruction, which is not covered by the main charge, may create an appellate issue that ultimately may benefit the client.

Sentencing Instructions—Rule for Courts-Martial 1005²⁴³

Now that each side has gotten, or attempted to get in the last word, it is time for the incredibly exciting, on the edge of your seat journey through chapter two of the *Military Judges' Benchbook*.²⁴⁴ It's time for instructions!

In 2003 the CAAF decided two important instruction cases: *United States v. Miller*²⁴⁵ and *United States v. Tship*.²⁴⁶

231. *Id.* at 273.

232. *Id.*

233. *Id.*

234. *Id.* at 274.

235. See MCM, *supra* note 3, MIL R. EVID. 608. Military Rule of Evidence 608(c) states: "Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." *Id.*

236. *Saferite*, 59 M.J. at 273 (citing *United States v. Hunter*, 21 M.J. 240, 242 (C.M.A. 1986)).

237. *Id.* at 274.

238. *Id.* (citing *United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992)) (quoting *United States v. Shaw*, 26 C.M.R. 47, 51 (C.M.A. 1958) (Ferguson, J., dissenting)).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 274-75. The finding of no prejudice was based on the following: the members already knew the appellant escaped; the military judge gave the panel a limiting instruction which advised them that they were not to sentence the appellant for his absence because if he was to be punished for the absence, that would come at a "different forum, on a future date"; the appellant was facing a maximum punishment of 230 years confinement; the trial counsel asked for a sentence of sixteen years; and the panel only adjudged six years. *Id.*

243. MCM, *supra* note 3, R.C.M. 1005.

244. DA PAM. 27-9, *supra* note 201.

In *Miller*,²⁴⁷ the government and defense agreed that the appellant was entitled to three days of confinement credit for civilian pretrial confinement related to the offenses for which he was ultimately convicted.²⁴⁸ While discussing instructions, the military judge informed the parties that he would give “the standard sentencing instructions in the Military Judge’s (sic) Benchbook.”²⁴⁹ The judge’s instructions did not advise the members that they should consider the appellant’s time in civilian confinement in adjudging an appropriate sentence nor did they instruct the members that the accused was entitled to day-for-day confinement credit for his time in civilian confinement (i.e., pretrial confinement credit).²⁵⁰ After instructing the members, the military judge asked the parties if they had any objections to the instructions given or any requests for additional instructions.²⁵¹ The defense counsel had no objections, however, he specifically requested the pretrial confinement credit instruction, to which the military judge responded, “I’m going to provide that independent of whatever happens.”²⁵² There was no specific request for a pretrial confinement instruction as a matter in mitigation instruction; that is, the defense failed to request an instruction advising the members that they should consider the time spent by the appellant in pretrial confinement

in adjudging an appropriate sentence. Although the military judge indicated he would give the pretrial confinement credit instruction, as requested by the defense, the military judge failed to give this instruction.²⁵³

On appeal, the appellant alleged the military judge erred by: (1) failing to instruct the members that they should consider the appellant’s time in pretrial confinement in adjudging an appropriate sentence; and (2) failing to give the pretrial confinement credit instruction as requested.²⁵⁴ In affirming the findings and sentence, the service court found the military judge did not err in failing to give the aforementioned instructions and even if he did, the error was harmless.²⁵⁵ The CAAF disagreed.²⁵⁶

Rule for Courts-Martial 1005(e)(5) requires the military judge to instruct the members to consider, among other items, information presented pursuant to RCM 1001(b)(1) and (2).²⁵⁷ Rule for Courts-Martial 1001(b)(1) requires the trial counsel to “inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint”;²⁵⁸ RCM 1001(b)(2) addresses personal data pertaining to an accused presented by the govern-

245. 58 M.J. 266 (2003).

246. 58 M.J. 275 (2003).

247. *Miller*, 58 M.J. at 266. The appellant was convicted at a general court-martial of drunk driving, wrongful possession of methamphetamine, and wrongful distribution of methamphetamine and sentenced by a panel of officer members to reduction to E-3 and a bad conduct discharge. *Id.* at 267.

248. *Id.*

249. *Id.*

250. *Id.* at 267-68. The *Benchbook* provides for the following specific instruction when addressing credit for time spent in pretrial confinement:

MJ: In determining an appropriate sentence in this case, you should consider that the accused spent ____ days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve his confinement, and will be given on a day for day basis.

DA PAM. 27-9, *supra* note 201, Instruction 2-5-22 (stating that the instruction quoted from the latest version of *DA Pam 27-9* is identical in all material respects to the version in effect at the appellant’s trial). See *United States v. Miller*, 56 M.J. 764, 765 n.1 (A.F. Ct. Crim. App. 2002).

251. *Miller*, 58 M.J. at 267-68.

252. *Id.* at 268.

253. *Id.*

254. *United States v. Miller*, 56 M.J. 765 (A.F. Ct. Crim. App. 2002).

255. *Id.* at 764.

256. *Miller*, 58 M.J. at 270.

257. MCM, *supra* note 3, R.C.M. 1005(e)(5). Rule for Courts-Martial 1005 states in part:

(e) Required instructions. Instructions on sentence shall include:

. . .

(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3), and (5).

Id. R.C.M. 1005.

ment.²⁵⁹ In the case at bar, the government offered and admitted a Personal Data Sheet that reflected the appellant's three days in pretrial confinement.²⁶⁰ Finally, the Discussion to RCM 1005(e)(5) states, in part, that the military judge's "tailored instructions should bring attention to [among other items], any pretrial restraint imposed upon the accused."²⁶¹ After discussing RCM 1005, the CAAF focused on *United States v. Davidson*,²⁶² holding "'the military judge's rote instructions' that omitted any instruction on considering pretrial confinement 'were inadequate as a matter of law.'"²⁶³ Considering RCM 1005(e)(5)²⁶⁴ and *Davidson*,²⁶⁵ the CAAF held that an instruction that pretrial confinement is a matter the panel should consider in adjudging an appropriate sentence is a "mandatory"²⁶⁶ instruction.

After finding the instruction was required, the court next examined the issue of waiver and its applicability, because the defense neither objected to the instructions given nor requested a specific instruction in this area.²⁶⁷ Notwithstanding the waiver provision in RCM 1005(f),²⁶⁸ the court held that waiver does not apply to this mandatory instruction.²⁶⁹ "The military

judge bears the primary responsibility for ensuring that mandatory instructions, including the pretrial confinement instruction mandated by the President in RCM 1005(e) and by this Court's decision in *Davidson*, are given and given accurately."²⁷⁰

The court next examined the failure to give the requested pretrial confinement credit instruction.²⁷¹ Failure to give a requested instruction is error if the following three-part test is met: "(1) the requested instruction is correct; (2) 'it is not substantially covered in the main charge'; and (3) 'it is on such a vital point in the case that the failure to give it deprived [the] defendant of a defense or seriously impaired its effective presentation.'"²⁷² The appellant met parts one and two; however, he failed with regard to part three because the requested instruction was not on such a vital point.²⁷³ Therefore, the court agreed with the service court's opinion as it related to this instruction; the military judge did not err by failing to give the requested pretrial confinement credit instruction.

Despite finding error with the failure to give the general instruction regarding pretrial confinement, and assuming

258. *Id.* R.C.M. 1001(b)(1).

259. *Id.* R.C.M. 1001(b)(2).

260. *Miller*, 58 M.J. at 268.

261. MCM, *supra* note 3, R.C.M. 1005(e)(5) (discussion).

262. 14 M.J. 81 (C.M.A. 1982).

263. *Miller*, 58 M.J. at 269 (citing *United States v. Davidson*, 14 M.J. 81, 86 (C.M.A. 1982)). "Contrary to the holding of the Air Force court, *Davidson* correctly reflects that where an accused has served pretrial confinement, the military judge must instruct the members that the pretrial confinement is a factor to consider in fashioning an appropriate sentence." *Id.*

264. MCM, *supra* note 3, R.C.M. 1005(e)(5).

265. *Davidson*, 14 M.J. at 81.

266. *Miller*, 58 M.J. at 270.

267. *Id.*

268. MCM, *supra* note 3, R.C.M. 1005(f). The waiver provision in question reads as follows:

(f) *Waiver*. Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside of the presence of the members.

Id.

269. *Miller*, 58 M.J. at 270.

270. *Id.*

271. Pretrial confinement as something the court should consider in adjudging an appropriate sentence differs from pretrial confinement credit, which is merely day-for-day credit for time, spent in pretrial confinement.

272. *Id.* (citing *United States v. Zamberlan*, 45 M.J. 491, 492-93 (1997)) (quoting *United States v. Eby*, 44 M.J. 425 (1996)).

273. *Id.* at 270-71 (stating that the three days in confinement was a "negligible" part of the defense's sentencing case; the nature and duration of confinement were not highlighted by the defense; there was no evidence of the appellant's good behavior while confined; and the civilian confinement was not addressed in the defense counsel's argument).

arguendo error regarding the pretrial confinement credit instruction, the court found any such errors were harmless,²⁷⁴ thus, affirming, albeit on different reasoning, the lower court's decision regarding the findings and sentence in the case.²⁷⁵

The next CAAF decision in the area of instructions is *United States v. Tship*,²⁷⁶ which involves an appellant's RCM 1001(c)(2)(C) right to make an unsworn statement.

In *Tship*,²⁷⁷ the appellant alleged that the military judge effectively "impaired" the appellant's unsworn statement when the judge instructed the members on the possibility of an administrative discharge in the event the court did not adjudge a punitive discharge.²⁷⁸ The CAAF disagreed.

During the appellant's unsworn statement, the appellant stated, in part:

As much as I would like the chance to redeem myself, I know that my commander can discharge me even if I do not receive a bad conduct discharge today. The worst punishment for me will be wondering every day for the rest of my life what my life would have been like if I would have just been able to stay in the Air Force.²⁷⁹

Before the sentencing argument, the military judge held an Article 39(a)²⁸⁰ session in which he proposed the following instruction:

In his unsworn statement, the accused made reference to the possibility of an administra-

tive discharge. Although an unsworn statement is an authorized means to bring information to your attention, and must be given the consideration it is due, as a general evidentiary matter, information about administrative discharges and the procedures related thereto, are not admissible in trial by courts-martial.

The issue concerning the possibility of the administrative discharge of the accused is not a matter before this court. This is what we call a collateral matter. You should not speculate about it. After due consideration of the accused's reference to this matter, you are free, in your discretion, to disregard the reference if you see fit. This same caution applies to any references made concerning this information by counsel during arguments.²⁸¹

The military judge provided the proposed instruction without objection from the defense. The CAAF, applying a plain error analysis, found no error, plain or otherwise.²⁸² Regarding the instructions given to the members, the court found that the military judge properly "placed [the] Appellant's statement in the appropriate context for purposes of their decision making process."²⁸³ In reaching this conclusion, the court relied heavily on the nature of the appellant's statement, that is, the fact that the appellant made an "unfocused, incidental reference to an administrative discharge."²⁸⁴ The court left for another day whether the instruction would be appropriate "in a case involving different references to an administrative discharge."²⁸⁵

274. *Id.* at 271. The court found no prejudice because there was no evidence that the conditions of confinement were "unduly harsh or rigorous," the three days was "de minimis," the issue of pretrial confinement was "obviously of little consequence to either party," and the appellant's sentence was "favorable." *Id.*

275. *Id.* "Although we do not adopt the reasoning in the decision of the United States Air Force Court of Criminal Appeals, that decision is affirmed on the grounds set forth in this opinion." *Id.*

276. 58 M.J. 275 (2003).

277. *Id.* The appellant was convicted at a special court-martial of two specifications of dereliction of duty and dishonorable failure to maintain sufficient funds and sentenced to reduction to E-1 and a bad conduct discharge. *Id.*

278. *Id.* at 277.

279. *Id.* at 276.

280. UCMJ art. 39(a) (2002).

281. *Tship*, 58 M.J. at 277.

282. *Id.* "Under the facts of this case, the instructions by the military judge did not constitute error, much less plain error." *Id.*

283. *Id.*

284. *Id.* The appellant did not ask the members to do anything with the information he provided. Furthermore, the defense counsel failed to mention or incorporate his client's reference to the commander's administrative discharge option in his sentencing argument, thus reinforcing the "passing . . . unfocused, incidental" nature of the statement. *Id.*

285. *Id.*

Miller is simple. Defense counsel should demand that the military judge affirmatively instruct the panel to consider, in arriving at an appropriate sentence, that the client spent time in pretrial confinement. More importantly, defense counsel should review RCM 1005(e) and demand that the “mandatory” instructions therein are given; when they are not, defense counsel should object.²⁸⁶ *Tschip* should put both the government and the defense on notice that the CAAF will critically evaluate any instructions by a military judge that appear to limit or impair an appellant’s right of allocution. Remember, the CAAF left for another day the propriety of the *Tschip* instruction in a case with a “focused” unsworn statement. Although the CAAF does not define what transforms a statement from “unfocused” to “focused,” they provide some clues: the statement should be more than a “passing” thought; the statement should not be “vague,” the statement should ask the members to take some sort of action or refrain from taking some action; and the defense counsel should reference or incorporate the statement

in the sentencing argument.²⁸⁷ Defense counsel—if it is important enough to mention in the unsworn statement, then use it in your sentencing argument!

Now that counsel for both sides and the military judge have decided on the appropriate instructions, it’s time to argue.

Argument—Rule for Courts-Martial 1001(g)²⁸⁸

Argument is by definition meant to be persuasive.²⁸⁹ Trials by their nature, whether guilty pleas or contested, are contentious. Unfortunately, the desire to be persuasive coupled with the contentious nature of criminal trials sometimes results in argument that cross the line from the proper to the improper.²⁹⁰ The cases that will be discussed in this section are: *United States v. Barrazamartinez*,²⁹¹ *United States v. Melbourne*,²⁹² *United States v. Leco*,²⁹³ and *United States v. Warner*.²⁹⁴ The

286. *But see* *United States v. Hopkins*, 56 M.J. 393 (2002) (finding the military judge’s refusal to give a tailored “expression of remorse” instruction was not error). “The military judge has considerable discretion in tailoring instructions to the evidence and law. The decision as to how that discretion should be applied to statements of an accused, such as remorse, regret, or apology, depends on the facts and circumstances of each particular case.” *Id.* at 395 (citing *United States v. Greaves*, 46 M.J. 133, 139 (1997)).

287. *See Tschip*, 58 M.J. at 277.

288. MCM, *supra* note 3, R.C.M. 1001(g). Rules for Courts-Martial 1001(g) states:

Argument. After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directives relative to punishment or quantum of punishment greater than the court-martial may adjudge. Trial counsel, may however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Id.

289.

1. an oral disagreement; verbal opposition; contention; altercation . . . 2. a discussion involving different points of view; debate . . . 3. a process of reasoning; series of reasons . . . 4. a statement, reason, or fact for or against a point . . . 5. an address or composition intended to convince or persuade; persuasive discourse . . .

RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed.1998). “2: a: a reason given in proof or rebuttal b: discourse intended to persuade 3 a: the act or process of arguing: ARGUMENTATION b: a coherent series of statements leading from a premise to a conclusion . . .” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1990). “1 orig., proof or evidence 2 a reason or reasons offered for or against something 3 the offering of such reasons; reasoning 4 discussion in which there is a disagreement; dispute; debate 5 a short statement of subject matter, or a brief synopsis of a plot; summary . . .” WEBSTER’S NEW WORLD DICTIONARY (3d ed. 1988). “Argument to jury. Closing remarks of attorney to jury in which he strives to persuade jury of merits of case; generally limited in time by rules of court. The argument is not evidence.” BLACKS LAW DICTIONARY 98 (5th ed. 1979).

290. *See, e.g., United States v. Baer*, 53 M.J. 235 (2000) (stating that it was improper for trial counsel to ask members to place themselves in the shoes of the victim in a case in which the appellant plead guilty to robbery, aggravated assault, kidnapping, and murder; held no prejudice from improper argument considering trial counsel asked for a life sentence and the appellant was sentenced to twenty-five years).

[I]t bears reiterating that in cases of improper argument, each case must rest on its own peculiar facts. Trial counsel who make impermissible Golden Rule arguments [i.e., asking members to place themselves in the shoes of the victim(s)] and military judges who do not sustain proper objections based upon them do so at the peril of reversal.

Id. at 239.

291. 58 M.J. 173 (2003).

292. 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

293. 59 M.J. 705 (N-M. Ct. Crim. App. 2003).

294. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

first three cases address the inappropriateness, through argument, of inflaming the passions of the sentencing authority;²⁹⁵ the last case discusses the appropriateness of objecting to counsel's argument.

In *Barrazamartinez*,²⁹⁶ during his sentencing argument in the appellant's drug case before a panel of Marine Corps officers,²⁹⁷ the trial counsel made the following argument, without objection from the defense counsel:

We in America are engaged in a war on drugs. You have heard from the President. You heard from the agents, and customs, that borders are being flooded . . . The drug cartels in Mexico are bringing drugs in this country and polluting our population. They're making money off our weak individuals. They do it because people like [Appellant] carry the drugs across the border.²⁹⁸

After advising the panel that the maximum punishment in the appellant's case was thirty years confinement, the trial counsel went on to say, again without objection from the defense counsel:

The reason thirty years is authorized is because it's worth a lot. It's worth a lot of

punishment because it is the type of activity we need to deter. Not just one individual but anyone who would think about doing it, tarnishing the Marine Corps' image of bringing drugs across this border. Almost a traitor to our country in that he's bringing in drugs when we are trying, as a nation, to stop them from coming in.²⁹⁹

On appeal, the appellant alleged that the trial counsel committed plain error during his sentencing argument by referring to America's "war on drugs" and referring to the appellant as "almost a traitor."³⁰⁰ Applying a plain error analysis,³⁰¹ the CAAF found, in a 2-1-2 judgment, that the argument did not rise to the level of plain error.³⁰²

In addressing concerns raised by the first part of the trial counsel's argument referencing America's war on drugs, the court first noted RCM 1001(g)'s prohibition of references to: the convening or a higher authority; the views of such authorities; policies or directives regarding a certain punishment; or punishment greater than that authorized by statute.³⁰³ After delineating the rule's prohibitions, the court noted that "comment on 'contemporary history or matters of common knowledge within the community'" is not prohibited by RCM 1001(g).³⁰⁴ Applying this framework to the trial counsel's reference to America's war on drugs, the court found that the ref-

295. See, e.g., *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983); *Baer*, 53 M.J. at 237.

When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul blows. *United States v. Edwards*, 35 MJ 351 (CMA 1992); *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, L.Ed. 1314 (1935). It is appropriate for trial counsel—who is charged with being a zealous advocate for the Government—to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 MJ 235, 239 (CMA 1975).

However, as noted by the Court of Criminal Appeals, "arguments aimed at inflaming the passions or prejudices of the court members are clearly improper." Unpub. op. at 4, citing *United States v. Clifton*, 15, MJ 26, 30 (CMA 1983).

Baer, 53 M.J. at 237.

296. *Barrazamartinez*, 58 M.J. at 173. The appellant was convicted at a general court-martial of conspiracy to wrongfully import and wrongful importation of over ninety pounds of marijuana into the United States and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for eleven years, and a dishonorable discharge. *Id.* at 174.

297. *Id.*

298. *Id.* at 175.

299. *Id.*

300. *Id.* at 175-76. The appellant also alleged that his sentence was inappropriately severe compared to that of his co-conspirator who received four years confinement and a bad conduct discharge. The court disagreed. *Id.* at 176.

301. The court applied a plain error analysis because of the defense counsel's failure to object to the allegedly improper argument. "In light of the defense counsel's failure to object, we review the trial counsel's argument for plain error." *Id.* at 175.

302. J. Gierke delivered the judgment of the court in which C.J. Crawford joined; J. Effron filed a separate opinion concurring in the result affirming the decision of the Navy-Marine Court; J. Baker filed a separate dissenting opinion in which J. Erdmann joined. *Id.* at 173.

303. *Id.* at 175. References to policies or directives create the appearance of unlawful command influence. *Id.* Counsel arguing policies "are well advised to tread lightly [in this area]." *Id.* (quoting *United States v. Kropf*, 39 M.J. 107, 109 (C.M.A. 1994)).

304. *Id.* (quoting *Kropf*, 39 M.J. at 108).

erence was not a reference to department or command policies and did not inject or appear to inject unlawful command influence into the sentencing proceeding; rather, it was a reference to a matter of “common knowledge.”³⁰⁵ Furthermore, the trial counsel made no reference to “the Commander-in-Chief’s or any other commander’s expectations regarding [the] Appellant’s punishment.”³⁰⁶ Thus, the first part of the trial counsel’s argument did not rise to the level of plain error.³⁰⁷

The court next focused on the trial counsel’s reference to the appellant as “almost a traitor.”³⁰⁸ The court started its discussion by expressing some concern with the use of this term: “[t]rial counsel’s reference to [the] Appellant as ‘almost a traitor’ gives us pause. The term ‘traitor’ is particularly odious, particularly in the military community.”³⁰⁹ Despite its concern over the phrase “almost a traitor,” the court found no plain error in the use of the phrase. The court’s rationale was based on the following three distinct points: first, the trial counsel only used the phrase once;³¹⁰ second, the trial counsel, in describing the appellant, used the word “almost” in conjunction with traitor;

³¹¹ and finally, the primary definition of “traitor” is “‘one who betrays another’s trust or is false to an obligation or duty.’”³¹² Finding that the importation of over ninety pounds of marijuana into the United States is a clear betrayal of trust placed in a Marine by the U.S. Marine Corps, the court found the argument by counsel to be a fair comment on the evidence.³¹³

The next case in which an appellant alleged improper argument by counsel is *United States v. Melbourne*.³¹⁴ In *Melbourne*,³¹⁵ the charges stemmed from an incident in which the appellant drove a borrowed vehicle off an airfield runway into the waters of a local bay resulting in the drowning of another sailor, Seaman W. McDowell.³¹⁶

On appeal, the appellant alleged the trial counsel committed plain error in his sentencing argument by asking the sentencing authority, a military judge sitting alone, to imagine himself as the drowning victim.³¹⁷ The statement at issue, which was not objected to by the defense, was:

305. *Id.*

306. *Id.*

307. *Id.* at 175-76.

308. *Id.* at 176.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1252 (10th ed. 1993)).

313. *Id.* at 176.

It was fair comment on the evidence for trial counsel to argue that the appellant had betrayed the trust placed in him as a member of the United States Marine Corps. Defense counsel did not consider the argument sufficiently offensive to warrant an objection. *See Nelson, 1 M.J. at 238 n. 6.* While we do not condone the trial counsel’s use of this potentially inflammatory term, we hold that Appellant has not carried his burden of persuading this Court that the sentencing argument characterizing him as “almost a traitor” was plain error.

Id. (Baker, J., & Erdmann, J., dissenting).

[T]he lead opinion argues, trial counsel used the word traitor in its colloquial and descriptive sense, and not in its constitutional sense to describe someone who commits treason, like Benedict Arnold.

I disagree. I think the better view is that trial counsel was appealing to the members’ sense of duty and patriotism as Marines by suggesting that Appellant’s offenses were the equivalent of treason as used in the Constitutional sense. To a panel of members sworn to uphold and defend the Constitution, such suggestion, in my view, is inflammatory and runs undue risk of drawing the members unfairly away from the evidence at hand.

Id. at 177.

314. *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

315. *Id.* The appellant was convicted at a general court-martial of violating a lawful general order, reckless operation of a motor vehicle resulting in death, drunken operation of a motor vehicle resulting in death, negligent homicide, and false official statement and sentenced to reduction to E-1, forfeiture of all pay and allowances, twenty months confinement, and a bad conduct discharge. *Id.* at 683.

316. *Id.* at 684-86.

Imagine what those minutes, the last minutes of [Seaman McDowell's] life, were like, gasping for air, struggling, choking, feeling the pressure in his chest building when he drowned, knowing—knowing during that one to two minutes that he was drowning, and he was going to die, and he'd never see his family again.³¹⁸

Applying a plain error analysis to the counsel's argument, the service court disagreed with the appellant, finding no error, plain or otherwise.³¹⁹ While asking the sentencing authority to place itself in the shoes of the victim is improper,³²⁰ asking the sentencing authority to imagine the victim's "fear, pain, terror, and anguish as victim impact evidence" is not.³²¹ The court noted:

Taking the trial counsel's entire sentencing argument in context, we find no indication that the direction, tone, and theme of the argument were calculated to inflame the military judge's passions or possible prejudices. [citation omitted]. Instead, trial counsel was describing the tragic circumstances of Sea-

man McDowell's demise. Such circumstances were appropriate considerations bearing upon the sentence to be awarded.³²²

The next case addressing allegedly improper argument due to its overly inflammatory nature is *United States v. Leco*.³²³ In *Leco*,³²⁴ the appellant was convicted of knowingly possessing and receiving child pornography. In his sentencing argument, the trial counsel stated "the reason the appellant downloaded these images is '[b]ecause he has a sexual interest in children.'" ³²⁵ The defense counsel failed to object to the argument.³²⁶

On appeal, the appellant argued that the trial counsel's comment was improper because it implied that "the appellant would commit or had committed uncharged acts of child abuse."³²⁷ The service court disagreed. Applying a plain error analysis to the argument, the court found no error whatsoever; rather, "[f]ar from constituting or causing plain error, the trial counsel's statement was entirely proper."³²⁸ Evaluating the facts and circumstances surrounding the offense, to include the appellant's own admissions, the court found the trial counsel's argument to be "fair comment on the evidence."³²⁹ Assuming *arguendo* that the counsel's argument was error, the court found no prejudice

317. *Id.* at 689. The appellant also alleged his sentence was inappropriately severe. The court disagreed, finding his sentence was appropriate and to grant relief at this time "would be to engage in clemency, a prerogative reserved for the convening authority." *Id.* at 691 (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988)).

318. *Id.*

319. *Id.* at 690.

320. *Id.*; see also *United States v. Baer*, 53 M.J. 235 (2000).

321. *Melbourne*, 58 M.J. at 690. In the case at bar, the testimony from the pathologist, a government witness was that:

[O]nce Seaman McDowell became submerged, it took somewhere between one and two minutes for his instinctive need to breathe to overtake his conscious fear of inhaling water. The presence of water in Seaman McDowell's lungs would have caused a coughing response, which in turn led to the intake of additional water. After struggling for approximately two minutes with water-filled lungs, Seaman McDowell most likely lost consciousness. Approximately two minutes later, Seaman McDowell was dead.

Id. at 685. Seaman McDowell was found twenty to twenty-five feet from the submerged vehicle. *Id.*

322. *Id.* at 690.

323. *United States v. Leco*, 59 M.J. 705 (N-M. Ct. Crim. App. 2003).

324. *Id.* The appellant was convicted of knowingly possessing and receiving child pornography in violation of 18 U.S.C. § 2252 and sentenced to reduction to E-1, one-year confinement and a bad-conduct discharge. *Id.* at 706. The appellant was actually charged with a Clause 3, Crimes and Offenses Noncapital, Article 134 Offense. See UCMJ art. 134 (2002); see also 10 U.S.C. § 934 (2000); 10 U.S.C. § 2252 (The Child Pornography Prevention Act, CPPA 2000)).

325. *Leco*, 59 M.J. at 710.

326. *Id.*

327. *Id.*

328. *Id.* at 711.

329. *Id.* The court considered the following: the evidence adduced at trial supported the claim that the appellant downloaded over 600 images of child pornography on to his computer; he carefully categorized these images on his computer; and the appellant's statements during the providence inquiry along with his NCIS statement, that included admission that he enjoyed looking at pictures of older children, supported the trial counsel's argument. *Id.*

since the trial was judge alone and “[a] military judge is presumed to know and follow the law.”³³⁰ Likewise, a military judge may be presumed to have disregarded any improper argument.”³³¹

Finally, the last arguments case is *United States v. Warner*,³³² in which the military judge sustained the trial counsel’s objection to the defense’s sentencing argument.

If readers recall the discussion of *Warner* in the earlier section entitled “Aggravation Evidence—Rule for Courts-Martial 1001(b)(4),” this case involved an appellant who was charged with aggravated assault upon his two and one-half month old infant son³³³ and was convicted of assault and battery upon a child under sixteen years of age.³³⁴ In addition to arguing the government presented improper aggravation evidence through its medical expert,³³⁵ the appellant argued the military judge erred by improperly limiting the defense counsel’s sentencing argument when he sustained the trial counsel’s objection to that portion of the argument stating the appellant wanted to “be a good father.”³³⁶ The court disagreed noting, “Counsel must limit their sentencing arguments to evidence in the record and any fair inferences as may be drawn from them.”³³⁷ The evidence before the court, to include the appellant’s unsworn statement, did not address the appellant’s desire to be a “good father”; rather, the focus of the appellant’s unsworn statement was his desire to “get on with his life” and “better himself.”³³⁸ By objecting, the trial counsel “foreclose[d] the defense counsel from expanding her argument beyond what was contained in the unsworn statement.”³³⁹

The lesson that counsel, both government and defense, should take from these argument cases is to listen to the adversaries argument and object! Inflaming the passion of the sen-

tencing authority and arguing facts not in evidence are objectionable, therefore, object. Failing to object will result in the waiver of any issue absent plain error, therefore, object. Finally, although an accused’s allocution is a broad, largely unfettered right, argument based on facts not contained in an accused’s unsworn statement is objectionable, therefore, object.

Sentence Credit

Of all the potential sentencing issues lurking within the RCM 1000 series, the CAAF sent the strongest message in the area of sentence credit; defense counsel need to aggressively pursue every applicable type of sentence credit available to an accused or risk waiver of the issue.³⁴⁰

In 1999, the CAAF decided *United States v. Rock*,³⁴¹ a case addressing when sentence credit is taken off the adjudged versus the approved sentence. In 2002, the CAAF clarified its 1999 guidance with its decision in *United States v. Spaustat*,³⁴² establishing a bright line rule for all military justice practitioners to follow:

[I]n order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision [30 August 2002], this Court will require the convening authority to direct application of all confinement credits for violations of Article 13 or RCM 305 and all Allen credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by

330. *Id.* (citing *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994)).

331. *Id.* at 711 (citing *United States v. Waldrup*, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989)).

332. 59 M.J. 573 (A.F. Ct. Crim. App. 2003).

333. *Id.* at 574.

334. *Id.*

335. *Id.* at 581.

336. *Id.* at 583.

337. *Id.*

338. *Id.*

339. *Id.*

340. See, e.g., *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (stating that *Allen* credit is day-for-day credit for time spent in legal pretrial confinement); *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (stating that *Mason* credit is sentence credit for restriction or other conditions on liberty tantamount to confinement); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (stating that *Pierce* credit is “day-for-day,” dollar-for-dollar, “stripe-for-stripe” credit for prior Article 15 punishment for the same offense forming the basis of a court-martial conviction); *United States v. Suzuki*, 14 M.J. 491 (stating that *Suzuki* credit is credit for illegal pretrial confinement amounting to punishment, unusually harsh circumstances or conditions of confinement; codified in RCM 305(k)); MCM, *supra* note 3, R.C.M. 305(k). Rule for Court-Martial 305(k) allows credit for pretrial confinement involving an abuse of discretion or unusually harsh circumstances (previously referred to as *Suzuki* credit). It also allows credit for non-compliance with the procedural requirements of RCM 305(f), (h), (i), or (j). MCM, *supra* note 3, R.C.M. 305(f), (h), (i), & (k).

the convening authority, unless the pretrial agreement provides otherwise.³⁴³

This past term, the court provided further guidance in the area of sentence credit by addressing the following: can an appellant raise the issue of Article 13 or *Mason*³⁴⁴ credit for the first time on appeal; does RCM 305 require a commander's pretrial confinement memorandum in restriction tantamount to confinement situations; and is an appellant, who spent time in legal pretrial confinement, entitled to sentence credit against an adjudged discharge or reduction when no confinement was adjudged in his case? The CAAF answered all three questions with NO, NO, and NO!

In *United States v. Inong*,³⁴⁵ the appellant sought, for the first time, sentence credit from the CAAF for illegal pretrial punishment for thirty-seven days spent in maximum custody.³⁴⁶ After reviewing the issue, and the action taken by the service

court on remand,³⁴⁷ the CAAF held that the NMCCA was correct in holding that the appellant was not entitled to sentence credit. This was because he made a tactical decision to raise the Article 13, UCMJ, pretrial punishment issue to the sentencing authority in the hopes of receiving a lesser sentence rather than presenting the issue to the military judge as a demand for sentence credit.³⁴⁸ In other words, the appellant's actions were tantamount to a waiver of the Article 13 issue.³⁴⁹ More importantly, the CAAF established the following prospective bright line rule regarding Article 13 credit: "in the future, failure at trial to raise the issue of illegal pretrial punishment waives that issue for purposes of appellate review absent plain error."³⁵⁰

In *United States v. King*,³⁵¹ the CAAF was faced with a situation similar to that in *Inong*.³⁵² This time the question was whether an appellant could raise a demand for *Mason*³⁵³ credit for the first time on appeal.

341. 52 M.J. 154 (1999). The appellant was tried and convicted by a military judge sitting alone of two specifications of conspiracy to distribute drugs, eight specifications of use, possession with the intent to distribute, and distribution of drugs, and two specifications of absence without leave. At trial, the military judge awarded the appellant 240 days (i.e., eight months) of credit for restrictions on the appellant's liberties not amounting to confinement but amounting to pretrial punishment in violation of Article 13, UCMJ. The military judge sentenced the appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for fifty-three months, and a dishonorable discharge. In announcing the sentence, the military judge explained that the fifty-three months already took into account the previously awarded eight months of credit. At action, the convening authority, pursuant to a pretrial agreement, approved reduction to E-1, forfeiture of all pay and allowances, confinement for three years, and a dishonorable discharge. The convening authority also credited the appellant with three days of pretrial confinement credit for time spent in actual confinement.

On appeal, the appellant alleged that both the military judge and convening authority erred in applying the eight months of sentence credit to the adjudged, as opposed to the approved, sentence. The CAAF disagreed, addressing three distinct situations: first, when there is no pretrial agreement in the case; second, when a case involves a pretrial agreement but the adjudged sentence is less than the agreement; and third, when the adjudged sentence exceeds that contained in the pretrial agreement. In the first two situations, the credit is applied to the adjudged sentence. In the third, the court held in situations in which the appellant has served confinement, actually or constructively, credit for such confinement comes off the approved sentence. If credit is awarded for non-confinement situations, and the pretrial agreement does not state otherwise, there is no requirement to apply the credit awarded to the lesser of the adjudged or approved sentence. *Id.*

342. 57 M.J. 256, 263 (2002). "This case illustrates that, even after *Rock*, there is some confusion about the application of confinement credits when a pretrial agreement is involved." *Id.*

343. *Id.* at 263-64.

344. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (stating that sentence credit may be awarded for restriction or other conditions on liberty tantamount to confinement).

345. 58 M.J. 460 (2003). The appellant was convicted at a general court-martial of conspiracy to commit larceny, desertion, larceny, making and uttering bad checks, and housebreaking and sentenced by a military judge to reduction to E-1, forfeiture of all pay and allowances, confinement for three years, and a dishonorable discharge. *Id.*

346. *Id.* at 461.

347. As a result of the request for relief, the CAAF set aside the prior decision of the NMCCA and "remanded the case to that court 'to consider this question initially and to take remedial action if necessary.'" *Id.* (citing *United States v. Inong*, 54 M.J. 375 (2000)).

348. *Id.* at 463.

349. See *United States v. Southwick*, 53 M.J. 412 (2000); *United States v. Tanksley*, 54 M.J. 169 (2000).

350. *Inong*, 58 M.J. at 461 (overruling *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994)). The court also overruled *United States v. Southwick*, 53 M.J. 412 (2000) and *United States v. Tanksley*, 54 M.J. 169 (2000) to the extent that they established a "'tantamount to affirmative waiver rule' in the Article 13 arena." *Id.* at 465.

351. 58 M.J. 110 (2003).

352. *Inong*, 58 M.J. at 460.

353. 19 M.J. 274 (C.M.A. 1985).

In *King*,³⁵⁴ the appellant's commander placed pretrial restrictions on the appellant's movements, restricting him to the Air Base, placing certain base establishments off-limits, and requiring the appellant to obtain prior permission before going to specified places on the base.³⁵⁵ At trial, the appellant's defense counsel failed to move for any credit (i.e., *Mason*³⁵⁶ credit) for restriction tantamount to confinement.³⁵⁷ The CAAF found the pretrial conditions and limitations placed on the appellant did not amount to restriction tantamount to confinement; therefore, the appellant was not entitled to any credit.³⁵⁸ More importantly, the court examined the applicability of waiver to *Mason*³⁵⁹ credit holding that in the future, absent plain error, failure to seek *Mason*³⁶⁰ credit at trial waives the issue for appellate review.³⁶¹

In addition to applying waiver to situations involving pretrial punishment in violation of Article 13 and *Mason* credit, the CAAF reviewed, in *United States v. Rendon*,³⁶² the applicability

of RCM 305(k) credit to situations involving restriction tantamount to confinement. In this decision, the CAAF addressed concerns raised by Judge Baker and Senior Judge Sullivan in their concurrences in *United States v. Chapa*.³⁶³

In *Rendon*,³⁶⁴ the appellant sought *Mason*³⁶⁵ credit for restriction that he alleged was tantamount to confinement.³⁶⁶ The appellant also sought RCM 305(k) credit for the command's failure to follow the procedures in RCM 305 for reviewing pretrial confinement.³⁶⁷ The military judge agreed, in part, awarding thirty-nine days of *Mason* credit for restriction tantamount to confinement; however, he denied the defense's motion for RCM 305 (k) credit.³⁶⁸ Although not alleged as error on appeal and not requested by the appellant, the Coast Guard Court of Criminal Appeals, sua sponte, awarded the appellant an additional thirty-three days of RCM 305(k) credit related to the period determined by the military judge to be restriction tantamount to confinement.³⁶⁹

354. *King*, 58 M.J. at 110. The appellant was convicted at a general court-martial of disobeying a lawful order, two specifications of making a false official statement, and thirteen specifications of larceny and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-nine months, and a bad conduct discharge. *Id.* at 111.

355. *Id.*

356. *Mason*, 19 M.J. at 274.

357. *King*, 58 M.J. at 111.

358. *Id.* at 112.

359. *See Mason*, 19 M.J. at 274.

360. *See id.*

361. *King*, 58 M.J. at 114. "The purpose of the so called raise-or-waive rule is to promote efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined." *Id.*

362. 58 M.J. 221 (2003).

363. 57 M.J. 140 (2002). In *Chapa*, J. Baker noted the following in his concurrence:

Is R.C.M. 305 credit due for pretrial restriction tantamount to confinement? I am skeptical. First, if it is due, then it will likely be due in all cases of restriction tantamount to confinement. By definition, restriction tantamount to confinement presents the situation where the commander will not have applied RCM 305 because he or she believes an accused is in restriction and not in confinement—constructive or actual. Second, if it is always due, then why is it not obvious error for a military judge to grant *Mason* credit, but not address RCM 305? I think the better argument is that it is not due.

Id. at 144. S.J. Sullivan, writing separately, noted in his concurrence that "the Army Court's decision in Gregory is flawed and should not be followed by this Court." *Id.* at 147.

364. *Rendon*, 58 M.J. at 221. The appellant was convicted at a special court-martial of attempting to distribute lysergic acid diethylamide (LSD), attempting to use LSD and Ecstasy, five specifications of wrongful use of Ecstasy, two specifications of wrongful use of LSD, and wrongful possession of Ecstasy and sentenced to reduction to E-1, forfeiture of "one-half pay for six months," confinement for sixty days, and a bad conduct discharge. *Id.* at 221-22. Rule for Courts-Martial 1003(b)(2) requires that absent total forfeitures, forfeitures adjudged shall be stated in whole dollar amounts per month for a specific number of months. In the case at bar, forfeitures of "one-half pay for six months" were adjudged and the promulgating order reflected forfeiture of \$521 pay per month for six months. The Coast Guard Court of Criminal Appeals corrected the error by affirming a forfeiture of only \$521 pay. *Id.*

365. *Mason*, 19 M.J. at 274.

366. *Rendon*, 58 M.J. at 222.

367. *Id.* at 222; *see also* MCM, *supra* note 3, R.C.M. 305.

368. *Rendon*, 19 M.J. at 223.

On appeal, the General Counsel for the Department of Transportation certified the issue of whether the lower court erred when it “sua sponte held that the military judge should have granted . . . R.C.M. 305(k) credit based on a violation of R.C.M. 305(i) for a period of pretrial restriction tantamount to confinement.”³⁷⁰ The CAAF, in reversing the service court’s decision, held the service court erred in awarding RCM 305(k) credit for a violation of RCM 305(i) when the restriction “did not involve physical restraint, the essential characteristics of confinement.”³⁷¹ In arriving at its decision, the court examined the plain language of RCM 305 and determined that, “[o]n its face, R.C.M. 305 applies to ‘pretrial confinement.’”³⁷² Furthermore, RCM 305(k) is “limited by unambiguous language to ‘confinement served’ after noncompliance with R.C.M. 305(f), (h), (i), or (j)” and there is “no support . . . for applying R.C.M. 305(k) to any lesser forms of restraint.”³⁷³ The court concluded its opinion with clear guidance abrogating “any [suggestion] that R.C.M. 305 is per se applicable to restriction tantamount to confinement,” clarifying that RCM 305 “applies to restriction tantamount to confinement only when the conditions and constraints of that restriction constitute physical restraint, the essential characteristic of confinement.”³⁷⁴

The final case in the area of sentence credit is *United States v. Josey*,³⁷⁵ a case in which the CAAF settled the issue of whether confinement credit must be applied against an

adjudged discharge or reduction, an issue left open by its decision in *United States v. Rosendahl*.³⁷⁶

In *Josey*,³⁷⁷ the appellant was a master sergeant in the Air Force convicted of, among other offenses, two specifications of wrongful use of cocaine and sentenced at a general court-martial to reduction to E-1, forfeiture of all pay and allowances, and confinement for eight years.³⁷⁸ On appeal, the AFCCA set aside the findings regarding the two drug specifications and returned the case to the convening authority authorizing a rehearing on the drug specifications.³⁷⁹ After determining that a rehearing would be impractical, the convening authority reassessed the sentence and approved only so much of the sentence as provided for forfeiture of \$600 pay per month for four months and reduction to E-6.³⁸⁰ At the time of the reassessment, the appellant already served almost thirty-one months in confinement.³⁸¹ On appeal for a second time, the appellant argued he was entitled to sentence credit for the time he served in confinement, that he should receive additional credit for his accumulated good time credit, and that the credit owed should be applied to his approved reduction.³⁸² The AFCCA disagreed, concluding that although the appellant is entitled to credit for his time spent in confinement, it “should only be applied against his approved sentence to forfeitures” and not his reduction.³⁸³

369. *Id.* at 224. The service court relied on *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986) (holding that commanders must comply with RCM 305 in restriction tantamount to confinement situations, including the provision requiring preparation of a commander’s memorandum when confining a Soldier), *aff’d*, 23 M.J. 246 (C.M.A. 1986) (summary disposition) in awarding the additional thirty-three days of RCM 305(k) credit.

370. *Rendon*, 19 M.J. at 222.

371. *Id.*

372. *Id.* at 224.

373. *Id.*

374. *Id.* at 225 (abrogating *United States v. Gregory*, 21 M.J. 952 (ACMR 1986), *aff’d*, 23 M.J. 246 (C.M.A. 1986) (summary disposition)).

375. 58 M.J. 105 (2003).

376. 53 M.J. 344 (2000) (applying credit for confinement served against forfeitures but not reduction). In *Rosendahl*, the accused served 120-days of confinement. On appeal, the sentence was set aside and the rehearing sentence was reduction and a bad conduct discharge. On appeal, the appellant alleged he was entitled to credit for his 120-days of confinement against his adjudged reduction. The court disagreed, leaving for another day “whether a different result might be warranted in a case involving lengthy confinement.” *Id.* at 348.

377. *Josey*, 58 M.J. at 105. The appellant, a master sergeant in the Air Force, was convicted at a general court-martial of two specifications of wrongful use of cocaine, violation of a general regulation, making and uttering eight checks and dishonorably maintaining sufficient funds in the account to cover the checks, and failing to go to his appointed place of duty and was sentenced to reduction to E-1, forfeiture of all pay and allowances, and confinement for eight years. *Id.* at 106.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.* at 107; *see also* *United States v. Josey*, 56 M.J. 720, 721 (A.F. Ct. Crim. App. 2002).

382. *Josey*, 56 M.J. at 721.

383. *Id.* at 722.

On appeal to the CAAF, the appellant renewed his argument that he was entitled to credit for time spent in confinement and that such credit should be applied against his adjudged reduction.³⁸⁴ The CAAF disagreed, holding that “reprimands, reductions in rank, and punitive separations [personnel-related punishments] are so qualitatively different from other punishments that conversion is not required as a matter of law.”³⁸⁵ The court concluded by differentiating between credit required “as a matter of law” versus credit awarded as a matter of “command prerogative.”³⁸⁶

A convening authority has broad authority to commute a sentence into a different form so long as it involves a reduction in penalty. [Citation omitted]. Although a convening authority reviewing a case upon remand is not required as a matter of law to convert a reprimand, reduction in grade, or punitive separation to another form of punishment for purposes of providing former-jeopardy credit, the convening authority is empowered to do so as a matter of command prerogative under Article 60(c).³⁸⁷

In the appellant’s case, he was not entitled, as a matter of law, to credit against his adjudged reduction for the thirty plus months he spent in lawful post-trial confinement.³⁸⁸

As noted at the outset of this section, the CAAF has made clear that defense counsel should raise the issue of sentence credit at trial or waive it for appellate review. Defense counsel should talk to the client and ask detailed questions about the client’s pretrial treatment. For example: was the client treated differently after charges were preferred; was he continuing to perform duties commensurate with his grade and military occupational skill (MOS); was he free to go anywhere on or off post; assuming the client is of legal drinking age, could he consume alcohol pending the disposition of the charges; was anything, such as his civilian clothing or motor vehicle, taken from him; did the client acquire a “nickname” after charges were preferred; etc.? Once the defense counsel has gathered all the relevant facts, he should bring the appropriate motion for sentence

credit. The days of litigating sentence credit for the first time on appeal are over!

The final area of discussion in the sentencing potpourri is sentence rehearings and the limits on sentences that may be approved after a rehearing.

Sentence Rehearings—Rule for Courts-Martial 810³⁸⁹

Rule for Courts-Martial 810³⁹⁰ and Article 63, UCMJ,³⁹¹ lay out the general rule that after a rehearing, no sentence “in excess of or more severe than” the previously adjudged or approved sentence may be approved. Last term, the CAAF, in *United States v. Mitchell*,³⁹² addressed the meaning of “in excess of or more severe than” as it relates to punitive discharges.

In *Mitchell*,³⁹³ the appellant was convicted at his original court-martial of five specifications of wrongful distribution of a controlled substance, among other offenses, and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for ten years, and a bad conduct discharge.³⁹⁴ On appeal, the Army Court of Criminal Appeals (ACCA) found two of the five drug distribution specifications to be factually insufficient, set aside the sentence, and authorized a rehearing on sentence.³⁹⁵ At the rehearing, the appellant was sentenced to reduction to E-1, confinement for six years, and a dishonorable discharge.³⁹⁶ The ACCA, applying an objective standard—a reasonable person standard—affirmed the rehearing sentence holding that the combined rehearing sentence was not “in excess of or more severe” than the original sentence.³⁹⁷ In essence, the court found that no reasonable person would view six years confinement and a dishonorable discharge as more severe punishment than the originally adjudged ten years confinement and a bad conduct discharge.

On appeal, the CAAF reversed the service court’s decision as to sentence, affirming only so much of the sentence as provided for reduction to E-1, confinement for six years, and a bad conduct discharge.³⁹⁸ In arriving at its decision, the court noted that a punitive discharge is “qualitatively different” than con-

384. *Josey*, 58 M.J. at 106.

385. *Id.* at 108.

386. *Id.*

387. *Id.*

388. Notwithstanding its holding that the appellant, as a matter of right, is not entitled to credit for time served against the adjudged reduction, the court set aside the lower court’s decision and remanded the case for a new post-trial action in light of the convening authority’s “ambiguous” action. The convening authority in the case, as part of his action, stated that the appellant “will be credited with any portion of the punishment served from 5 November 1998 to 30 May 2001 under the [prior] sentence” *Id.* As the CAAF pointed out, it is unclear whether the CA intended to credit the time served against forfeitures as a matter of law or against the adjudged reduction as a matter of command prerogative under Article 60, UCMJ. Additionally, it was unclear whether the CA complied with the sentence reassessment requirements of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991). *Josey*, 58 M.J. at 108-09; see also UCMJ art. 60 (2002).

389. MCM, *supra* note 3, R.C.M. 810.

finement and between the two there is no “readily measurable equivalence.”³⁹⁹ The court concluded by holding “for the purposes of Article 63, [UCMJ and R.C.M. 810] a dishonorable discharge is more severe [than and in excess of] a bad-conduct discharge.”⁴⁰⁰

As evident from the CAAF’s decision in *Mitchell*,⁴⁰¹ discharges are different and when determining whether a rehearing sentence is “in excess of or more severe than” the original sen-

tence, whether adjudged or approved, the court will compare discharges without consideration to the other components of the court-martial sentence such as forfeitures, reduction, confinement, or fine.⁴⁰² Stated differently, although a reasonable person might view a rehearing sentence to a dishonorable discharge and ten years confinement as less severe than a bad conduct discharge and sixty years, the *Mitchell* court disagrees.⁴⁰³

390. *Id.* Rule for Courts-Martial 810 states, in part:

(d) Sentence limitations.

(1) In general. Sentences at rehearings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003. Except as otherwise provided in subsection (d)(2) of this rule, offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening authority or higher authority following the previous trial or hearing, unless the sentence prescribed for the offense is mandatory. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited above, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an “other trial” no sentence limitations apply if the original trial was invalid because a summary or special court-martial tried an offense involving a mandatory punishment or one otherwise considered capital.

Id. R.C.M. 810(d)(1). *See also* UCMJ art. 63. Article 63 states:

Each rehearing under this chapter shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

Id.

391. *Id.*

392. 58 M.J. 446 (2003).

393. *Id.*

394. *Id.* at 446-47.

395. *Id.* at 447.

396. *Id.*

397. *United States v. Mitchell*, 56 M.J. 936 (Army Ct. Crim. App. 2002).

398. *Mitchell*, 58 M.J. at 449.

399. *Id.* at 448 (citing *United States v. Rosendahl*, 53 M.J. 344 (2000); *United States v. Josey*, 58 M.J. 105 (2003)).

400. *Id.* at 449.

401. 58 M.J. 446 (2003); *see also* *United States v. Josey*, 58 M.J. 105 (2003).

402. *See, e.g., MCM, supra* note 3, R.C.M. 1003.

403. *But see Mitchell*, 58 M.J. at 449 (Crawford, C.J., concurring). In her concurrence, Chief Justice Crawford states:

The majority opinion sweeps a little too far, adopting a “discharge is different” rule that says Article 63, Uniform Code of Military Justice, 10 U.S.C. § 863 (2000), is violated any time an original sentence includes a bad-conduct discharge and a rehearing sentence includes a dishonorable discharge, “regardless of the overall sentence awarded at each sentence rehearing.”

Id.

Conclusion

As should be apparent from the numerous cases discussed in this article, sentencing is a complex area of courts-martial practice with many pitfalls for trial practitioners. More importantly, the courts, both the CAAF as well as the service courts, are holding counsel accountable for their trial decisions and applying waiver in cases in which counsel should have objected yet remained silent. Government counsel should be creative in

their sentencing cases, both in the evidence offered and the arguments made. Defense counsel, when something does not seem right, should object, object, and then, object again! They should make the trial counsel and judges, both at the trial and appellate level, earn their pay and make the difficult calls. Defense counsel should not throw the government and courts the “plain error” soft ball because of a failure to object. Silence is not a virtue when it comes to trial practice.